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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1185

GUSSIE JOFFE,

Petitioner,

v.

SIDNEY H. JOFFE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

The petitioner, Gussie Joffe, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey, entered in this proceeding on October 9, 1967.

OPINIONS BELOW

The per curiam decision of the Supreme Court of New Jersey, affirming the judgment of the Appellate Division for the reasons expressed in the Appellate Division's opinion, is

reported at 50 N.J. 265 and at 234 A.2d 232 at 233; it is reprinted in Appendix A hereto, p. A-1, *infra*. The opinion of the Appellate Division also appears at 50 N.J. 265 and at 234 A.2d 232 and is reprinted in Appendix A hereto.

The opinion of Judge Concilio of the Superior Court of New Jersey, dated August 24, 1964, is unreported; it is reprinted in Appendix B hereto, p. B-1, *infra*. The unreported contempt order of October 20, 1964, signed by Judge Duffy of the Superior Court of New Jersey, together with the unreported contempt order of November 12, 1964, signed by Judge Nimmo of that court, are also reprinted in Appendix C hereto, p. C-1, *infra*.

JURISDICTION

The final judgment of the Supreme Court of New Jersey, affirming the contempt orders, was entered on October 9, 1967. A timely petition for rehearing was denied by that court on October 31, 1967. On January 16, 1968, Mr. Justice Brennan signed an order extending the time for filing this petition for certiorari to and including March 1, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the Full Faith and Credit Clause of the United States Constitution permits a New Jersey court to deny full faith and credit to prior jurisdictional and substantive rulings of a New York court in a separation, alimony and custody proceeding because of the New Jersey court's conclusion, rendered upon its own reexamination of the New York record, that the New York court erred in asserting in *personam* jurisdiction over the defendant spouse, where

(a) The New York jurisdictional rulings were rendered after full and fair hearings, no fraud being suggested or alleged,

(b) The defendant spouse concededly made special appearances in the New York court to challenge jurisdiction over his person and the subject matter of the action, as a result of which hearings were had and repeated rulings were made that the New York court had jurisdiction over both his person and the subject matter of the action, and

(c) The defendant spouse made what the New York court determined to be a general appearance and submission to its *in personam* jurisdiction, said determination having been made after a full and fair hearing on this question.

2. Whether, consistent with the Due Process Clause of the Fourteenth Amendment, a litigant may be found in civil contempt of a state court and fined and threatened with imprisonment for failure to obey court orders restraining the litigant from proceeding further in the court of another state where (a) the latter court had determined, after full and fair hearings, that it had jurisdiction over the parties and the subject matter, and (b) the orders and judgments of the latter court were entitled to full faith and credit.

3. Whether, consistent with the Due Process Clause of the Fourteenth Amendment, a state court may punish a mother, found guilty of civil contempt for failure to obey certain court orders unrelated to the custody of her child, by ordering the transfer of the custody of her minor child from her to the father.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Sec. 1: No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . .

United States Constitution, Art. IV, Sec. 1: Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Rec-

ords and Proceedings shall be proved, and the Effect thereof.

United States Code, Title 28, § 1738: Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

New York Civil Practice Act, Sec. 237: Defendant's appearance. The defendant's appearance must be made by serving upon the plaintiff's attorney within twenty days after service of the summons exclusive of the day of service, a notice of appearance, a copy of an answer or a notice of motion raising an objection to the complaint in point of law. A voluntary general appearance of the defendant is equivalent to personal service of the summons upon him.

New York Civil Practice Act, Sec. 237-a: Defendant's special appearance. 1. Except as otherwise provided in subdivision two, a defendant may make a special appearance solely to object to the Court's jurisdiction over his person. Such objection, whether based on the ground that process or its service is insufficient or that the defendant is a person not subject to the jurisdiction of the court must be raised by a motion to set aside the service of process or to strike out part of the complaint, as may be appropriate. The objection, if raised in a manner other than that provided in this section or if combined with an objection to the merits, except as otherwise provided in subdivision four, shall be deemed waived.

2. An objection to the court's jurisdiction over the person of the defendant shall not be waived by joining therewith a motion objecting to the court's jurisdiction of the subject matter.

3. If the plaintiff on the hearing of the motion shall by affidavit deny the facts alleged by the defendant or state facts tending to obviate the objection, the court may:

(a) hear and determine the objection and where the court has no jurisdiction over any cause of action stated in the complaint, the court shall order the service set aside; however, where process and its service are sufficient to give the Court jurisdiction over one or more of the causes of action stated in the complaint, the court shall order struck out of the complaint such part of it, including all or part of a prayer for relief, as is beyond the court's jurisdiction, in which case, the complaint will be deemed amended accordingly, or the court may order an amended complaint to be served; or

(b) direct that the question of fact, which shall be clearly and succinctly stated in the order, be tried by a jury or referee, the findings of fact of which shall be reported to the court for its action; or

(c) overrule the objection and in its discretion allow the same facts to be alleged in the answer as a defense.

STATEMENT OF THE CASE

In punishment for her civil contempt of court, the New Jersey judgment below as to which review is here sought has ordered the petitioner wife (1) to take all necessary steps to vacate virtually all orders or judgments previously obtained by her in New York, (2) to pay to the court clerk fines totaling over $3000, (3) to be committed to the Passaic County Jail unless and until she vacates the orders and pays the fines, and (4) to be deprived of the custody of her child, contrary to the previous order of the New York court.

Underlying that contempt judgment is the ruling of the Superior Court of New Jersey, affirmed in all respects on appeal, that "full faith and credit need not be given to the proceedings commenced by the . . . [wife] in the Supreme Court of New York as the . . . [husband] was never served

with process in New York, never appeared generally, nor did he actively participate or argue the merits of that action." See p. B-23, *infra*. Thereby rejected and set to naught were repeated New York rulings finding jurisdiction to exist over both the person of the husband and the subject matter of the wife's suit.

Such rulings had been entered after full and fair hearings on the jurisdictional issues. They were entered as the result of both special and general appearances by the husband wherein he challenged the jurisdiction of the New York court. The special appearances were concededly made. But the general appearances were found by the New York court, after a hearing directed solely to that issue and after a thorough review of the entire proceeding, from the established fact that the husband (1) had participated so actively on the merits of the New York action as to constitute a general appearance therein under New York law, and (2) had therefore submitted himself generally to the jurisdiction of the New York court, "conferring in personam jurisdiction over his person in the within action." See p. F-6, *infra*.

The contempt judgment, of course, is but one element in a prolonged, complex and at times bitter marital dispute between the husband and wife. That dispute has been augmented by differences as to the custody and support of their minor son, an intellectually gifted child who suffered from a form of hereditary blindness and who was in need of urgent medical attention and special schooling. The two had been married in 1955, first in a civil ceremony in New Jersey and then in a large religious and civil ceremony in New York. The petitioner wife at all times has been a practicing attorney with offices in New York City, while the respondent husband has been a practicing physician in New Jersey. The husband had four children by a previous marriage. The child of these two parties had been born in New Jersey in 1958 and has lived in New York at nearly all times.

The parties have long been in dispute as to whether their principal home was intended to be in New York or in New Jersey; and the wife has long maintained that the husband was in fact domiciled in New York during the marriage and that he intended and wanted to leave New Jersey due to the local notoriety attending his relationship with and divorce from his first wife. The New York courts found, however, that the wife had satisfied the statutory requirements with respect to New York residence so as to enable her to maintain suit in New York for separation, custody and alimony. See p. D-1, *infra*. The New Jersey courts, at the same time, found that the husband was a resident of New Jersey and as such entitled to institute a somewhat similar action in the courts of that state. See p. B-7, *infra*.

The record is clear that the petitioner wife at no time abandoned her New York residence or domicile. At all times she filed her federal and state tax returns in New York and was permanently registered in New York as a voter. She has constantly maintained law offices in New York City and has resided there both before and subsequent to the separation from her husband. Indeed, the husband resided with her in the New York City apartment for substantial periods of time prior to the separation, moving much of his furniture to that apartment after closing and selling some of his New Jersey residential properties. The child has resided with the petitioner wife in New York City substantially all the time before and at all times following the abandonment of the wife and child by the husband in May of 1962.

Out of this situation arose two series of legal actions, the first being instituted by the wife in the New York courts and the second being started by the husband in the New Jersey courts. The full faith and credit problems and the due process issues resulting from these competing lawsuits can best be revealed by a comparative chronology of legal events, derived from the certified record before this Court:

New York Supreme Court

(1) June 21, 1962: Wife filed complaint seeking (a) separation from husband, (b) permanent alimony and support, (c) counsel fees, and (d) custody of child. Service effected on husband in New Jersey pursuant to § 235 of New York Civil Practice Act, permitting such service in a separation action.

(2) June 21, 1962: Justice Conlon issued sequestration order attaching all assets of husband in New York (including his furniture) and appointing a receiver thereof. This order was served on husband in New Jersey pursuant to court authorization.

(3) July 12, 1962: Justice Flynn issued order granting temporary custody of child to the wife pending further hearing and restraining husband from entering the Montclair, N. J., home to carry off or dispose of property therein. Husband also ordered to show cause why temporary custody should not be awarded wife pending trial, why *pendente lite* alimony of $500 per week should not be granted for support of wife and child, and why $5000 counsel fees should not be awarded wife to prosecute separation action. On July 22, the return day of this order, the husband appeared through New York counsel to seek an adjournment of the matter.

(4) Aug. 8, 1962: Order issued to husband to show cause why moneys should not be withdrawn

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New York Supreme Court **New Jersey Superior Court**

from sequestration to pay taxes and mortgage installments on Montclair property and to pay for support of child.

(5) Aug. 14, 1962: Husband, appearing "specially" through New York counsel, filed motion "for an order vacating and setting aside the summons and complaint and order to show cause, pursuant to Section 237-a of the Civil Practice Act on the ground that this Court does not have jurisdiction of the subject matter of this action and that defendant is a person not subject to the jurisdiction of this Court and for such other and further relief as may seem just and proper in the premises." Accompanying affidavit of husband argued merits of alimony complaint and motion. [*Justice Backer later held this to be a general appearance; see (20) below.*]

(6) Aug. 17. 1962: Husband through New York counsel obtained adjournments of hearings on all pending motions. [*Justice Backer later held this to be a general appearance; see (20) below.*]

(7) Aug. 22, 1962: Husband filed an affidavit seeking a stay of temporary order of Aug. 8 [(4) above] respecting payment of taxes and mortgage installments on the ground that he had been advised that the wife "has made the necessary current payments to the bank so that there is no immediate danger of foreclosure." [*Justice Backer later held this to be a general appearance; see (20) below.*]

All of these general appearances of husband in New York occurred prior to effective institution of his New Jersey action.

New York Supreme Court	New Jersey Superior Court
	(1) Aug. 23, 1962: Wife personally served in New Jersey with complaint, which had been filed by husband on Aug. 17, seeking (a) custody of child or visitation rights and (b) replevin of furniture located in New York. The child at this point was in New York in the custody of the wife pursuant to New York court decrees, and the furniture had previously been attached by the New York receiver under the New York sequestration order.
(8) Aug. 27, 1962: Husband's counsel argued merits of all pending motions, relying in part on husband's affidavit asking for stay of order directing receiver to make tax and mortgage payments (see (7) above) and arguing against need for immediate foreclosure. Court decision reserved. [*Justice Backer later held this to be a general appearance; see (20) below.*]	**(2) Aug. 27, 1962:** Husband obtained ex parte order to show cause, returnable Sept. 21, 1962, why sale of furniture should not be restrained until final hearing of action. Order also contained interim restraint of such sale until hearing on order to show cause.
(9) Sept. 5, 1962: Order signed compelling husband to show cause why New Jersey action should not be restrained; interim order issued restraining husband from proceeding in New Jersey.	
(10) Sept. 17, 1962: Justice Klein issued decision denying husband's motion to vacate service of process (see (5) above), ruling that "although there appears to be some conflict with respect to exactly where the parties maintained their principal residence, if any, sufficient competent proof had been set forth herein to readily indicate that plaintiff [the wife]	

New York Supreme Court

satisfies the jurisdictional requirements with respect to New York residence outlined in section 1165a, subdivision 3 of the Civil Practice Act." See Appendix D hereto, p. D-1, *infra*.

(11) Sept. 19, 1962: Husband's attorney moved to reargue motions respecting alimony, counsel fees, withdrawals from sequestered funds, and service of process. Claim here made that an award of support could not be made independently of award for alimony *pendente lite*; husband also claimed he was paying $35 a week for child's support notwithstanding lack of visitation rights. [*Justice Backer later held this indicated a general appearance; see (20) below.*

New Jersey Superior Court

(3) Sept. 20, 1962: Wife moved to dismiss action on grounds of (a) full faith and credit clause of U.S. Constitution, (b) res judicata, and (c) physical presence of child in New York, where jurisdiction over child had already attached and where wife was providing support.

(4) Sept. 20, 1962: Wife obtained order directing husband to show cause why complaint should not be dismissed in accord with motion to that effect or, alternatively, why husband should not be restrained from proceeding in New Jersey until New York actions had been determined. *Interim restraint was issued, restraining husband from proceeding further in New Jersey, including*

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proceeding on show cause order of Aug. 27 (see (2) above). Husband granted leave to move to dissolve or modify restraints here imposed on 2 days' notice to wife.

This order was obtained in disregard of New York restraining order of Sept. 5, 1962 (see (9) above) and without regard to the 2-day notice required to dissolve or modify the New Jersey restraining order of Sept. 20, 1962.

(5) Sept. 21, 1962: Without notice to wife and without moving to dissolve or modify Sept. 20 restraining order (see (4) above), husband obtained ex parte restraining order forbidding wife from proceeding in any manner in the New York proceedings, including any applications or orders to show cause or enforcement of sequestration orders in New York. *The wife was later found to have violated this order, for which she was held in contempt of court (see (15) and (16) below).*

(12) Sept. 25, 1962: Justice Klein signed order, based on his Sept. 17 decision, denying husband's motion to dismiss for lack of jurisdiction and to reargue three motions, finding that the husband's supporting grounds on reargument were "clearly insufficient" to warrant any deviation. *On Oct. 4, 1962, the husband's attorney filed a notice of appeal to the Appellate Division from this Sept. 25 order, but the appeal was never perfected.*

(13) Oct. 1 and 8, 1962: New York receiver moved to find husband's trustee in contempt for failure to turn over trust profits and cash income. Husband intervened through counsel, asked to be served with papers, and argued

merits of this contempt motion on Oct. 16, and later moved to vacate order of sequestration. [*Justice Backer later held these actions to constitute a general appearance; see (20) below.*]

(14) Oct. 23, 1962: Husband submitted Sept. 21 New Jersey order restraining wife from proceeding in New York.

(15) Nov. 7, 1962: Justice Chimera denied "effectiveness" of New Jersey restraint and refused to enjoin wife from proceeding further in New York. He also denied husband's motion to vacate order of sequestration on jurisdictional grounds, finding that the "issue presented is res judicata (see order, Klein, J., September 12, 1962), and the motion is accordingly denied." Husband's trustee ordered to pay money to receiver to pay medical bills of child.

(16) Dec. 12, 1962: Justice Klein issued temporary order granting wife's motion for *pendente lite* alimony and counsel fees, and awarding temporary custody of child to wife. Alimony established at $275 per week for support of wife and child during pendency of action; husband granted reasonable visitation rights on Sundays in New York City from 9 a.m. to 5 p.m. New York receiver ordered to pay taxes and mortgage installments on New Jersey property. This order was premised in part on affidavits and counter-order submitted by

New York Supreme Court

husband and recited that the husband had vacated his special appearance. See Appendix E hereto, p. E-2, *infra*.

(17) Dec. 24, 1962: Justice Klein denied effectiveness of all New Jersey restraining orders and signed final order for *pendente lite* alimony, counsel fees and support in accordance with his ruling of Dec. 12 (see (16) above).

(18) Dec. 24, 1962: Wife filed motion for order declaring that husband had made a general appearance in New York proceedings and was subject to *in personam* jurisdiction of New York court. Due notice of hearing on motion given husband.

New Jersey Superior Court

(6) Dec. 19, 1962: Husband obtained ex parte order restraining wife from entering any order of support in New York. This order was submitted to Justice Klein of the New York Supreme Court. This order also granted the husband visitation rights from 7 p.m. Friday to 7 p.m. Sunday, contrary to the prior visitation order of New York Supreme Court of Dec. 12, 1962. *Wife never served with this order, but she was later found in contempt for violating the visitation provisions (see (15) and (16) below).*

(7) Jan. 4, 1963: Husband obtained ex parte order restraining wife from obtaining order of New York court as to husband's general appearance in that court. *Wife was not served with this*

New York Supreme Court	New Jersey Superior Court
	order, but was later found in contempt for violating it (see (15) and (16) below).
(19) Jan. 8, 1963: Hearing before Justice Backer on motion for order respecting husband's general appearance. Husband submitted only the New Jersey restraining order of Jan. 4, 1963.	
(20) Jan. 11, 1963: Justice Backer issued order, based on a review of "the entire file and papers therein," declaring that the husband (a) "by his participation in the case as set forth more fully herein has appeared generally herein," and (b) "has submitted himself generally to the jurisdiction of this Court, conferring in personam jurisdiction over his person in the within action." This order recited, *inter alia*, the New Jersey court injunction of Jan. 4, 1963, restraining the wife from obtaining this order, and denied any efficacy thereto. See Appendix F hereto, p. F-1, *infra*.	
	(8) March 11, 1963: Hearing on wife's motion to dismiss; wife submitted New York court orders and argued they were entitled to full faith and credit under U.S. Constitution.
(21) Aug. 12, 1963: Husband was served with notice of trial, on motion of New York receiver. Court moved the case to trial despite the husband's submission of the New Jersey restraints.	

New York Supreme Court	New Jersey Superior Court
	(9) Aug. 19, 1963: Wife filed motion to strike all restraints, based on full faith and credit due New York court orders.
	(10) Oct. 4, 1963: Husband commenced action for absolute divorce on ground of extreme cruelty, alleging New Jersey domicile and same marital facts involved in New York proceeding. Wife was served in New York on Jan. 3, 1964.
(22) Nov. 4, 1963: Trial of separation action before Justice Aurelio. Husband failed to appear but forwarded copies of New Jersey restraints; he also addressed a letter to the Justice, arguing jurisdiction, alimony, amount of his income, and acts of the wife. Wife granted decree of separation, plus judgment for back alimony, custody of child, $500 weekly support for herself and child, and all furniture and furnishings of the parties. Court also found that that husband had made a general appearance, that parties since marriage had been New York domiciliaries, and that the child since birth had been a New York domiciliary. Husband was duly and personally served with findings, conclusions and proposed order incorporating all the above. See Appendix G hereto, p. G-1, *infra.*	
(23) Dec. 2, 1963: Justice Aurelio signed final judgment of separation, which was duly served on husband. Judgment recited that husband, having been duly served	

New York Supreme Court

personally in New Jersey and having appeared generally in the proceeding, was subject to the New York court's *in personam* jurisdiction. The accompanying conclusions of law declared that (a) both parties were residents and domiciliaries of New York from the date of marriage to the present, (b) the matrimonial res at all times since marriage had been in New York, (c) the child has been and is a New York domiciliary, and (d) the husband "has appeared generally in this action by his attorney . . . . and that this Court has in personam jurisdiction over his person." See Appendix G hereto, p. G-5, *infra*.

New Jersey Superior Court

(11) Dec. 19, 1963: Wife moved to dismiss original New Jersey action on ground of final New York separation decree, asking that it be given full faith and credit.

(12) Aug. 11, 1964: Wife ordered to show cause why she should not be adjudged guilty of contempt of court for violation of New Jersey decrees.

(13) Aug. 24, 1964: Judge Concilio rendered opinion and order (a) denying all motions made by wife, (b) holding the husband to be a New Jersey domiciliary, (c) finding jurisdiction in New Jersey to decide custody by virtue of N.J.S.A. 9:2-2 and 9:2-3, providing for jurisdiction on complaint of either parent when living separately from the other, (d) acknowledging that the husband had appeared specially in New York to

contest jurisdiction over his person and subject matter of the action and referring to and quoting from various rulings of Justices Klein and Backer of the New York Supreme Court, and (e) denying full faith and credit to the New York court decrees since the husband "was never served with process in New York, never appeared generally, nor did he actively participate or argue the merits of that action." See p. B-23, *infra*.

The latter determination was based on Judge Concilio's own review of the New York papers before each Justice sitting on each motion and on Judge Concilio's view of the New York law, derived from testimony of New York lawyers concerning that law. All of these papers and orders had previously been before Justice Backer of the New York Supreme Court in his Jan. 11, 1963, determination as to the husband's general appearance in New York.

Judge Concilio referred the alleged contempt of the wife to other judges for determination. See Appendix B hereto, p. B-1, *infra*.

(14) Oct. 2, 1964: Hearing held on contempt citation, including claim by husband that he was not allowed to see child during hours specified in New Jersey court order. Wife interposed exemplified copies of New York interim and final orders as to Sunday visitation only, plus order forbidding removal of child from New York.

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(15) Oct. 20, 1964: Judge Duffy entered order finding wife guilty of civil contempt in that she proceeded with her New York action despite New Jersey court orders restraining her from doing so and that she violated New Jersey visitation order. She was ordered jailed and fined unless and until she vacated all New York orders and judgments obtained on and after Sept. 21, 1962. *As part of the contempt punishment, the custody of the child was "hereby awarded" to the husband pendente lite.* See Appendix C hereto, p. C-3, *infra.*

(16) Nov. 12, 1964: Further contempt order entered by Judge Nimmo, finding wife guilty of civil contempt, fining her $3000, ordering her to vacate all New York orders and judgments obtained on and after Sept. 21, 1962, and ordering imprisonment unless and until she complies. See Appendix C hereto, p. C-3, *infra.*

(17) March 17, 1966: Appellate Division of Superior Court of New Jersey affirmed orders adjudging wife to be in contempt. Appellate Division opinion stated it could find "nothing in the record to establish that at the time the Chancery Division action [in New Jersey] was commenced the New York court had personal jurisdiction over the . . . [husband] or the marital *res*." See Appendix A hereto, p. A-2, *infra.* This decision was affirmed per curiam, for the reasons expressed by the Ap-

pellate Division, by the New Jersey Supreme Court on Oct. 9, 1967. See Appendix A hereto, p. A-2, *infra*.

(18) Sept. 26, 1966: Husband obtained uncontested divorce decree; decree nisi entered. Wife was unable to attend or contest in person because of threat of arrest under contempt orders.

(19) 1962 to present: Sporadic hearings held from time to time on husband's custody claim; wife unable to attend most sessions due to arrest threat under contempt orders. Issue still unresolved, although wife has made claim that New York determination of custody is entitled to full faith and credit. During all of this period, husband has made sporadic payments of $35 a week for support of child.

RAISING THE FEDERAL QUESTIONS

The petitioner at each and every stage of the proceedings below in the New Jersey courts raised the federal constitutional issues relative to full faith and credit and due process of law, as indicated in the foregoing chronology.

Indeed, the critical opinion of Judge Concilio of the New Jersey Superior Court (see p. B-11, *infra*) contains an elaborate consideration of the full faith and credit issue, indicating that this federal issue was properly and timely raised by the petitioner at the earliest opportunity. While the appellate decisions are not as precise in their discussions of this federal issue, the question was properly raised by petitioner and the affirmance of the contempt findings necessarily involved a resolution of the federal question.

REASONS FOR GRANTING THE WRIT

This case involves an irreconcilable and massive conflict between two state judicial systems, a conflict that the Full Faith and Credit Clause of the United States Constitution was designed to preclude. Caught squarely in the middle of the battleground are two individuals—an innocent minor child whose custodial status is being torn asunder and the petitioner wife who has been fined and threatened with imprisonment for her understandable reliance on the Full Faith and Credit Clause. And despite all the great expenditures of energy and time by the judges of both New York and New Jersey, to say nothing of the legal expenses incurred by the parties, the battle has reached a complete stalemate. Only this Court can now resolve this interstate judicial deadlock.

Seldom has a full faith and credit case come to this Court so entwined with considerations of child welfare and personal liberty. Seldom has a state judiciary so consistently and openly flouted the duly adjudicated rulings of the courts of another state. Seldom has there been such a flagrant contradiction of the constitutional concepts of full faith and credit, concepts long recognized by this Court.

This constitutional problem is to be found at the very heart of the contempt orders in question. The validity of those orders necessarily depends upon the validity of the the New Jersey court's studied refusal to respect the careful adjudications of the New York Supreme Court that the respondent husband had subjected himself to the *in personam* jurisdiction of the New York courts through his special and his general appearances. Had those New York adjudications been accepted and been given the credit that the Constitution requires, the New Jersey decrees as to which the petitioner wife has been found in contempt would have no jurisdictional base.

Hence the problem under the Full Faith and Credit Clause is inescapably present. And the nature of the resolution of that problem by the New Jersey is such that review by this

Court is essential if the established constitutional concepts are to remain inviolate.[1]

1. The decision below directly conflicts with the relevant decisions of this Court respecting application of the Full Faith and Credit Clause.

Less than five years ago this Court in *Durfee v. Duke*, 375 U.S. 106, 111, restated the guiding principles of the Full Faith and Credit Clause in these terms:

> "However, while it is established that a court in one State, when asked to give effect to the judgment of a court in another State, may constitutionally inquire into the foreign court's jurisdiction to render that judgment, the modern decisions of this Court have carefully delineated the permissible scope of such an inquiry. From these decisions there emerges the general rule that a judgment is entitled to full faith and credit—even as to questions of jurisdiction—when the second court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court which rendered the original judgment."

And the *Durfee* opinion once again made it clear that the *res judicata* principles underlying the Full Faith and Credit Clause are fully applicable to jurisdictional determinations of a state court. This Court in *Durfee*, 375 U.S. at 113, quoted with approval the classic statement in *American Surety Co. v. Baldwin*, 287 U.S. 156, 166, that "The prin-

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[1] Petitioner, in a companion petition filed this day, also seeks review of a federal court ruling in a diversity case that petitioner's suit to recover two money judgments obtained in New York courts against her husband should be stayed pending the New Jersey ruling in the instant case on the full faith and credit issue. *Joffe v. Joffe*, 384 F.2d 632 (C.A. 3). The Third Circuit there acknowledged that the New Jersey Supreme Court "has now affirmed the Superior Court decision denying full faith and credit to the New York proceedings here involved." 384 F.2d at 633.

ciples of *res judicata* apply to questions of jurisdiction as well as to other issues."

The decision below, viewed from the standpoint either of the husband's conceded special appearances or of his general appearances as found by the New York court, is in flat conflict with the principles recognized and restated in *Durfee*.

A. *The husband's special appearances*

It is undisputed that the respondent husband made repeated special appearances in the New York Supreme Court to challenge its jurisdiction over his person and the subject matter of the wife's action. Judge Concilio of the New Jersey Superior Court so found: "This Court therefore finds that the plaintiff herein [the husband] did enter a special appearance to contest the jurisdiction of the New York court." See p. B-16, *infra*.

Such being true, it became irrelevant whether the husband also made a general appearance or otherwise submitted himself to the *in personam* jurisdiction of the New York court. The critical fact is that he made a special appearance challenging the jurisdiction of the New York court; by his August 14, 1962, motion to vacate and set aside the summons and complaint "on the ground that this Court does not have jurisdiction of the subject matter of this action and that defendant is a person not subject to the jurisdiction of this this Court," the husband invoked the jurisdiction of the New York court to decide its own jurisdiction. Full and fair hearings ensued on these jurisdictional matters. And the resulting and repeated rulings of the New York court to the effect that it had both subject matter and personal jurisdiction over the husband became entitled to full faith and credit under the principles recognized in *Durfee*.

Indeed, the abject refusal of the New Jersey courts to give full faith and credit to the New York rulings emanating from the special appearance is directly contrary to this Court's decision in *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U.S. 522. This Court there held that one fed-

eral court must give *res judicata* effect to the jurisdictional ruling of another federal court stemming from a special appearance challenging the jurisdiction of the latter court. The Court said (283 U.S. at 524-526):

> "It is of no moment that the appearance was a special one expressly saving any submission to such jurisdiction. . . . The special appearance gives point to the fact that the respondent entered the Missouri court for the very purpose of litigating the question of jurisdiction over the person. It had the election not to appear at all . . . It also had the right to appeal from the decision of the Missouri district court . . . It elected to follow neither of those courses, but, after having been defeated upon full hearing in its contention as to jurisdiction, it took no further steps, and the judgment in question resulted.
>
> "Public policy dictates that there be an end to litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded by the judgment of the tribunal to which he has submitted his cause."

Since the Court could find no reason why this *res judicata* doctrine, which is also the essence of the Full Faith and Credit Clause, "should not apply in every case where one voluntarily appears" specially, the decision below must be classed as a rejection of the *Baldwin* rationale. As such, the decision below demands review and correction.

B. *The husband's general appearance*

The New Jersey court's rejection of the efficacy of the New York rulings was expressly premised on its own determination that the husband "was never served with process in New York, never appeared generally, nor did he actively participate or argue the merits of that action." See p. B-23,

infra. In light of the acknowledged special appearances of the husband in New York, such a premise is quite inadequate to support a refusal to give full faith and credit to the New York decrees. Whether or not the husband made a general appearance or participated actively or was served in New York, he did challenge jurisdiction through his special appearance, resulting in jurisdictional rulings entitled to full faith and credit.

But even accepting this premise of the New Jersey court as one relevant to the application of the Full Faith and Credit Clause, the decision below is in complete conflict with the principles emunciated in *Durfee* and *Baldwin* and related cases. Here the New Jersey courts openly and frankly declined to respect the earlier New York determinations that the husband had subjected himself generally to the *in personam* jurisdiction of the New York courts – determinations rendered after full and fair litigation of that jurisdictional issue. That refusal, moreover, was grounded not on any notion or finding that the litigation as to the husband's general appearance in New York was less than full or fair but rather on the New Jersey court's own evaluation of the record and its disagreement with the New York court's repeated conclusion that the husband had in fact submitted himself to *in personam* jurisdiction in New York. In effect, the New Jersey court sat as an appellate court in review of the New York Supreme Court's findings, thereby creating havoc with procedural and appellate due process and with the orderly administration of interstate justice.

The New Jersey courts, in other words, simply reexamined and relitigated the New York proceeding and arrived at their own conclusion that there were no facts to support the New York court's determination that the husband had made a general appearance in New York. Thus Judge Concilio of the New Jersey Superior Court, "with the help of the voluminous file" that was before Justice Backer of the New York Supreme Court, "examined the matters listed in the . . . order" of Justice Backer that led the latter to conclude

that the husband had made a general appearance; based on that independent examination, Judge Concilio "finds that there is nothing in said file, nor that plaintiff herein [the husband], either himself or by his New York attorney, which would indicate that he entered a general appearance by participating in the case actively and arguing it on the merit." See p. B-19, *infra*. It was for that reason alone that Judge Concilio declined to give full faith and credit to any of the New York proceedings. See p. B-19, *infra*.

Similarly, the Appellate Division below could find "nothing in the record to establish that at the time the Chancery Division action [in New Jersey] was commenced the New York court had personal jurisdiction over the . . . [husband] or the marital *res*." In adopting that rationale, the New Jersey Supreme Court added its approval to the *de novo* New Jersey inquiry into the New York jurisdictional file.

But under the principles enunciated in the *Durfee* and *Baldwin* decisions, it was not the function of any New Jersey judge to reexamine the New York file. His constitutionally limited inquiry was at an end once it became evident that the New York jurisdictional ruling was rendered after the matter was put fully and fairly into litigation. And such full full and fair litigation respecting the jurisdictional issue is readily apparent from the record. The determinations of Justice Backer and Justice Klein of the New York Supreme Court on these jurisdictional matters were all rendered after appropriate motions had been made by the wife and served on the husband and after hearings were held at which the husband submitted whatever he felt relevant.[2] In New York, such determinations were entitled to be treated as *res judi-*

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[2]The fact that the husband saw fit, for the most part, to submit at these hearings on the jurisdictional question only copies of the New Jersey restraining orders does not detract from the full opportunity he was given to submit other material.

Moreover, the husband did file a notice of appeal from Justice Klein's ruling of September 25, 1962, overruling the husband's renewed

cata, as Justice Chimera ruled on November 7, 1962. In the words of this Court in *Durfee v. Duke*, 375 U.S. at 109, "Full faith and credit thus generally requires every State to give to a judgment at least the *res judicata* effect which the judgment would be accorded in the State which rendered it."

It thus becomes clear that the decision below is at war with the established doctrines of this Court under the Full Faith and Credit Clause. It has been said time and again that "One trial of an issue is enough," *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 78, and that there is, constitutionally speaking, "no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction . . ." *Stoll v. Gottlieb*, 305 U.S. 165, 172. The Full Faith and Credit Clause, in short, does not permit the New Jersey courts to reexamine or to review the once-litigated issue as to New York's *in personam* jurisdiction – even though New York's decision in the matter might be considered erroneous. *Ibid.*

Moreover, this Court's decision in *Davis v. Davis*, 305 U.S. 32, sets to rest any suggestion that the peculiar nature of the husband's plea in the New York courts – that he appeared there specially rather than generally – somehow permits a reexamination and relitigation of whether he also made a general appearance in New York. The Court there ruled that the courts of the District of Columbia had to give full faith and credit to a divorce decree rendered in Virginia,

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challenges to jurisdiction. But the husband never perfected that appeal, thus binding him to Justice Klein's determination.

As was said in *Sherrer v. Sherrer*, 334 U.S. 343, 352, "If respondent failed to take advantage of the opportunities afforded him, the responsibility is his own. We do not believe that the dereliction of a defendant in such circumstances should be permitted to provide a basis for subsequent attack in the courts of a sister State on a decree valid in the State in which it was rendered."

despite the wife's claim that the Virginia court lacked jurisdiction because the plaintiff husband in the Virginia case had not been domiciled in that state. The wife's assertion that the domicile issue had not been litigated in Virginia because her plea there "was special and made for the sole purpose of challenging jurisdiction" was found to be of no consequence (305 U.S. at 42):

> "If the plea alone may not be held to amount to a general appearance, there arises the question whether, by her participation in the litigation and acquiescence in the orders of the court relating to merits, she submitted herself to its jurisdiction for all purposes. Her plea and conduct are to be considered together."

And after noting that the wife's plea actually attacked the husband's domicile, that the record showed that the cause came on for hearing on the merits of that assertion, that the wife did not challenge the adverse ruling on the matter, and other such actions dealing with the merits, the Court concluded (305 U.S. at 43):

> "Considered in its entirety, the record shows that she submitted herself to the jurisdiction of the Virginia court and is bound by its determination that it had jurisdiction of the subject matter and of the parties."

Hence New York courts here had the right to consider whether, under New York law,[3] the husband's participation in the New York proceeding amounted to a general appear-

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[3] Under New York law in effect at the time of the events in question it was plain that a party who raised a point of law in objection to the complaint or who argued any point on the merits in an affidavit or otherwise would be considered to have made a general appearance, despite his characterization of the appearance as "special." *Ratkowsky v. Ratkowsky*, 272 App. Div. 775, 69 N.Y.S.2d 573; *Caines v. Prudential Ins. Co.*, 168 N.Y.S.2d 813; *Matthews v. Matthews*, 14 App. Div. 2d 546, 217 N.Y.S.2d 736. New York has subsequently abandoned all distinctions between special and general appearances.

ance. Once that determination was made after due notice and hearing, the New York rulings became entitled to full faith and credit.[4] New Jersey courts could not thereafter reexamine the nature of the husband's participation in the New York case and render a conclusion contrary to the New York result.

The decision below thus conflicts squarely with *Davis v. Davis, supra.*

2. The decision below raises important questions that should be decided by this Court.

It is important, of course, that any overt deviation from established constitutional principles be reviewed and corrected by this Court. But it is particularly important in the widely litigious area of domestic relations law that it be authoritatively determined once again that the Full Faith and Credit Clause means what it says and strictly limits the scope of judicial inquiry into jurisdictional matters already adjudicated in another state.

The New Jersey decision here in question may represent a growing parochial attitude of some state courts to protect their own domiciliaries at the expense of the litigated rights of non-residents. By the technique of simply reexamining, reviewing and reevaluating the file of proceedings in the court of another state, the New Jersey courts have achieved precisely that parochial result – and without support from any decision of this Court. Without review by this Court, the technique employed below can conceivably spread to other state courts; certainly in New Jersey, the technique is now an established doctrine.

Moreover, importance attaches to the decision below by virtue of the contempt of court context in which it comes

[4]There is no suggestion here that the New York ruling was in any way infected with fraud. On the contrary, the result was amply justified by the repeated arguments and claims of the husband relating to the merits of the sequestration, alimony and custody matters in issue.

to this Court. The petitioner wife in good faith relied upon the Full Faith and Credit Clause to rebut the stream of restraining orders issuing from the New Jersey court, orders that were flatly inconsistent with orders being issued by the New York court. And she was sustained in her position by the consistent refusal of the New York court to permit those restraining orders to hinder its actions or to hinder her right to proceed in New York – thereby adjudicating the legality of the New Jersey restraints.

Petitioner was thus placed in an impossible position between two conflicting sets of judicial actions. In that circumstance, does the Due Process Clause of the Fourteenth Amendment permit a state court to impose fines and imprisonment sanctions on one who in good faith followed one set of judicial actions rather than another? Is it consistent with due process to punish her for disobedience of court orders that, by virtue of the Full Faith and Credit Clause, New Jersey should never have issued?

If it be assumed that New Jersey was bound to respect the results of the New York litigation, may a litigant be punished for disobedience of the New Jersey orders that lacked any jurisdictional basis? Indeed, given that assumption, would New Jersey itself have permitted this contempt citation or this contempt punishment? *Cf. Donovan v. City of Dallas*, 377 U.S. 408, 414.[5]

These, then, are the important questions arising out of the ruling below, questions that deserve and need the fullest

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[5] In the *Donovan* case it was argued that a Texas state court finding of civil contempt should be upheld, despite this Court's ruling that the underlying court order was invalid, since there was a duty to obey a restraining order whether that order was valid or invalid. This Court, noting that the petitioners would be punished for disobeying an invalid order, remanded the matter to the state court since the Court did not know whether "the Texas court would have punished petitioners for contempt had it known that the restraining order petitioners violated was invalid." 377 U.S. at 414.

consideration by this Court. This is not a narrow case, limited in scope to the particular husband and wife now before this Court. Like all cases raising major constitutional considerations, its repercussions upon future litigation of a like nature are incalculable but nonetheless substantial. As such, the decision below deserves review.

3. The decision below transferring the custody of a minor child as punishment for a mother's alleged contempt of court raises a serious constitutional question.

A most disturbing aspect of the decision below is the approval necessarily given to that portion of the contempt order of Judge Duffy directing that "custody of the infant child of the marriage, Philip Lewis Joffe, be and the same is hereby awarded to the . . . [husband] pendente lite." See p. C-3, *infra*. This direction, whereby the wife lost custody of the child, was obviously part of the punishment being inflicted upon her for her contempt of the court's restraining orders.

At all times prior to this contempt order, the child had been in the wife's custody in New York pursuant to appropriate custody orders entered by the New York court. While notice was given the wife in the order to show cause respecting the alleged contempt that the custody of the child was thereby being put in issue, no testimony or evidence was introduced at the contempt hearing in any way bearing on the custodial welfare of the child. The custody order was sheer retribution, a penalty inflicted on the wife for her contempt.

A more flagrant violation of the rights and interests of the infant and of the wife under the Due Process Clause of the Fourteenth Amendment would be difficult to imagine. The child was made the pawn of the marital dispute between the husband and wife. His custody, moreover, was converted from a matter of his welfare into a weapon of punishment for the wife's contempt of court.

This gross perversion of a state court's contempt powers and the unwarranted intrusion upon the relationship between mother and son are too obvious to require elaboration. Mr. Justice Cardozo, while sitting on the New York Court of Appeals, once wrote that "The residence of a child may not be used as a pretense for the adjudication of the status of parents whose domicile is elsewhere, nor the definition of parental rights dependent upon status. . . . Parents so situated must settle their controversies at home." *Finlay v. Finlay*, 240 N.Y. 429, 148 N.E. 624, 625. And so here, the residence and the custody of this child should not be used as a pretense for adjudicating a marital dispute between husband and wife. Nor should such residence and custody be used as a sanction or penalty for contempt of court.

So treacherous a violation of basic due process and of basic human values fully merits the attention and consideration of this Court. Can the Due Process Clause of the Fourteenth Amendment be satisfied when a child's custody and welfare are made arsenals in the execution of a state court's punitive contempt powers?

CONCLUSION

For these various reasons, the writ of certiorari should issue and the judgment below should be reviewed.

Respectfully submitted,

EUGENE GRESSMAN
1730 K Street, N. W.
Washington, D. C. 20006
Counsel for Petitioner

March 1, 1968

APPENDIX A

SUPREME COURT OF NEW JERSEY
A-15 September Term, 1967

SIDNEY H. JOFFE,
Plaintiff-Respondent,

v.

GUSSIE JOFFE,
Defendant-Appellant.

Argued September 25, 1967. Decided October 9, 1967.

On appeal from a judgment of the Superior Court, Appellate Division, where the following per curiam opinion was filed:

"This is an appeal by defendant Gussie Joffe from orders entered in the Superior Court, Chancery Division, on October 20 and November 12, 1964 adjudging her in contempt for (1) violation of an order entered September 21, 1962, restraining her from proceeding in a separation suit instituted by her in the Supreme Court of New York; (2) violation of similar orders entered subsequent thereto, and (3) violation of an order entered December 19, 1962 granting plaintiff the right of visitation with the infant child of the marriage.

"Defendant contends that the orders adjudging her in contempt are void because the Chancery Division is bound by an order of the Supreme Court of New York holding that plaintiff Sidney H. Joffe submitted to its jurisdiction *in personam*. She further contends that the Chancery Division has no jurisdiction over the custody of the infant child of the marriage.

"There is no question concerning the jurisdiction of our courts over the person of defendant. She was personally served in New Jersey with the summons and complaint in

the action filed by plaintiff on August 17, 1962 seeking, *inter alia,* custody of or visitation rights with the infant child of the marriage. The record clearly indicates that the domicile of plaintiff was at all times in New Jersey—that the marital *res* and matrimonial domicile is here. Furthermore, the child's domicile is also in New Jersey.

"There is nothing in the record to establish that at the time the Chancery Division action was commenced the New York court had personal jurisdiction over the plaintiff or the marital *res.* It is further apparent that all New York judgments were obtained by defendant in violation of the Chancery Division restraining orders.

"By proceeding in the New York court after having been served with the restraining orders of our court, defendant was guilty of contempt. The judgment of the Chancery Division adjudging defendant in contempt of court is affirmed."

Mr. Thomas W. Dunn argued the cause for the appellant (*Mr. Walter H. Jones,* attorney.)

Mr. J. Mortimer Rubenstein argued the cause for the respondent.

PER CURIAM:

The judgment is affirmed for the reasons expressed in the opinion of the Appellate Division, *supra.*

APPENDIX B

SUPERIOR COURT OF NEW JERSEY
Chancery Division, Passaic County

SIDNEY H. JOFFE,
Plaintiff

v.

GUSSIE JOFFE,
Defendant.

Nos. M6660-61
and M32-62

OPINION OF JUDGE CONCILIO
Filed August 24, 1964

THE COURT: This matter is before this court on a petition and order to show cause to dismiss the complaint filed by the plaintiff in this cause or to enjoin or restrain him from proceeding in the same on the grounds: (a) that this court has no jurisdiction: (b) there is presently pending in a court of competent jurisdiction the issues to be determined in this cause: (c) that the jurisdiction of the infant child under the doctrine of parens patriae is in the court of the State of New York and (d) that the rule of comity and full faith and credit prevents this court from asserting jurisdiction, if any, from proceeding with the cause herein. This petition was filed on September 19, 1962. The order to show cause was returnable on October 5, 1962. Said order also restrained plaintiff from proceeding with his action.

The plaintiff, Sidney H. Joffe, filed a complaint in the Superior Court of New Jersey, Chancery Division, Passaic County, Docket Number M-32-62, on August 17, 1962, seeking custody of the infant child born of the marriage between the plaintiff and defendant, or in the alternative rights of visitation and also the return of certain personal property belonging to the plaintiff, alleged to have been taken by the defendant from the premises known as 155 Wildwood Avenue, Montclair, New Jersey.

It further appears that defendant, a New York Attorney, instituted an action against the plaintiff herein, in the Supreme Court of New York, New York County, in June 1962, for separate maintenance and support and custody of the infant child and miscellaneous relief concerning property, both personal and real, situate in New Jersey.

It is admitted and stipulated that Sidney H. Joffe was never served personally in the State of New York in the action instituted there by his wife, Gussie Joffe.

The record discloses that Gussie Joffe was served personally in New Jersey with the summons and complaint in the action commenced by her husband in the New Jersey Superior Court above referred to, on August 23, 1962, by someone in the Passaic County Sheriff's Office.

The Court, after reading the petition and the affidavits of both the plaintiff and defendant, came to the conclusion that it should hear oral testimony on the questions raised thereby as the affidavits were in such conflict, it did not know who was telling the truth. R.R. 4:44-4.

It is to be noted that the temporary restraining order signed by this court on September 21, 1962, enjoined and restrained the defendant herein, Gussie Joffe, her agents, servants and attorneys, from proceeding in any manner whatsoever in the action instituted by her against her husband, Sidney H. Joffe, in the Supreme Court of the State of New York, County of New York, Special Term, Part No. 12, Index 30789, 1962, and upon any application or order to show cause entered or pending in said matter, including but not limited to order to Show Cause which issued in said matter, to restrain the plaintiff herein, Sidney H. Joffe, from proceeding with his cause of action in this court, and further including but not limited to any action to enforce in any manner the Writ of Sequestration heretofore issued out of the Supreme Court of the State of New York * * * until the 5th day of October, 1962 and until the further order of this Court.

By virtue of this order and the order previously mentioned obtained by the defendant herein, the plaintiff is restrained from proceeding with the New Jersey action and the defendant herein is restrained from proceeding with the New York action.

Neither of these orders has been dismissed nor discontinued.

On the return day of these orders the matter was adjourned. From time to time thereafter orders of continuance were entered as were the hearings on the several petitions to hold the defendant herein in contempt.

The hearing upon defendant's petition was set down for hearing on March 11, 1963. At that hearing the defendant offered in evidence, certified and exemplified copies of certain proceedings and orders in the New York matter and contended that the matter between the parties in New Jersey was res judicata and that plaintiff's action in this state should be dismissed. The defendant, Gussie Joffe, did not take the stand. The court took no action on this motion as it felt it was not foreclosed from inquiring into the binding effect of the orders entered by the New York Court on this court and that it wanted to take testimony whether the plaintiff herein had entered a special or general appearance in the New York action. This court also wanted to take testimony as to the domicile of both the plaintiff and defendant.

The attorneys for both parties had New York attorneys testify on November 15, 1963. This court wishes to say in passing that it was not impressed by the manner in which this was handled by either party and further by the testimony of said attorneys and particularly the attorney called by the defendant herein.

A motion by the defendant to vacate an order dated August 14, 1963, was returnable on September 20, 1963. This motion was also continued. The defendant filed a supplemental notice of motion to take oral testimony of the plain-

tiff, which was returnable on October 4, 1963. This motion was also continued.

On December 19, 1963 plaintiff presented evidence as to his domicile. It is to be noted that defendant did not examine plaintiff relative to the two motions mentioned above.

At this hearing the court requested the defendant herein to furnish it with certified copies of all the pleadings, moving papers, returns of service, transcripts of testimony, determinations and orders filed and entered in the New York proceedings between the parties, excepting, however, those previously produced and entered in evidence in this matter. These were to have been forwarded to this court prior to the Christmas recess. The court wants it to be noted on the record that to date, this request has not been complied with. Pursuant to a letter of this court addressed to the defendant's attorney, dated February 17, 1964, it was requested that these papers be submitted to the court by March 5, 1964. During the week of March 9, 1964, the defendant's attorney called at my chambers in Newton, New Jersey and delivered to me a file purported to be that of the defendant in this matter and that of the plaintiff in the New York action. Although this was not proper evidence, the court felt it might be useful to peruse and assist it in arriving at its determination in this matter.

This court regrets that it had to delay rendering its decision on the motions until the summer recess.

I

This court shall decide the original motion made by the defendant first.

A

The preliminary determination for this court to make is whether the plaintiff was domiciled in New Jersey prior to and at time of the commencement of this action.

From the age of 4 years until he graduated from medical school the plaintiff resided in Haledon, New Jersey and was

registered and voted there. He then moved to Paterson, New Jersey and resided there until 1937 when he moved to Glen Rock, New Jersey, where he remained until 1959 when he moved to Montclair, New Jersey, where he lived until he moved back to Paterson, New Jersey in May 1962, where he has resided ever since. He is a licensed physician of the State of New Jersey. He began his practice in Paterson, New Jersey in 1935. He has never been licensed to practice medicine in any other state. He was married to Gussie Joffe at Glen Rock, New Jersey on January 15, 1955 by Nathan Bernstein, a Magistrate. At the time of said ceremony, the plaintiff was residing at 155 Rock Road, Glen Rock, New Jersey in a one-family home owned by him. At that time, he maintained an office for the practice of medicine at 556 East 28th Street, Paterson, New Jersey, together with his twin brother, Philip Joffe, which office and which practice he still maintains and has maintained continuously during the period of this marriage. At that time, he was on the staff of the Barnert Memorial Hospital of Paterson, New Jersey and is still on said staff. At the time of the marriage the defendant, who was and still is an Attorney at Law of the State of New York, was domiciled in and resided in the State of New York and maintained an apartment in the State of New York.

After the marriage, she came to live with the plaintiff and their home was located at 155 Rock Road, Glen Rock, N. J.

They continued to live at 155 Rock Road, Glen Rock, New Jersey until November 1959. Since 1945, while living at that address the plaintiff was affiliated with Temple Emanuel, a conservative temple of the Hebrew Faith, at Paterson, N. J. When he moved to Montclair, New Jersey, he became a member of the Temple Shomrei Emunah, at Montclair, being a Hebrew Temple. The defendant was also registered as a member at this temple and was affiliated with its sisterhood.

On March 22, 1955, an agreement was entered into between the plaintiff and defendant to execute joint wills,

both declared therein and in their wills that they were of the Borough of Glen Rock, Bergen County, New Jersey. It is also interesting to note that in the deed to the Montclair property, it is recited that they are of the Town of Montclair, Essex County, New Jersey. In May, 1962, the defendant in applying for a renewal of her passenger car license indicated she resided at 759 11th Avenue, Paterson, New Jersey. She also had a New Jersey driver's license.

The parties entertained their guests at their homes in New Jersey. The plaintiff's automobiles and his driver's license were registered in and issued by the State of New Jersey. He never had any issued by any other state. He further testified that he has always been a registered voter of the State of New Jersey and has never been registered in, nor voted in any other state.

There was some testimony relative to an apartment used by the defendant in New York. Plaintiff never paid for the rent, nor did he ever live there with the defendant. The plaintiff wanted the defendant to forego this but defendant countered that she could deduct the expense of the same from her income tax return as a business expense.

A child, Philip Lewis Joffe, was born of this marriage on July 23, 1958 at the Barnet Memorial Hospital, Paterson, New Jersey. After birth, the child lived with its parents at either the Glen Rock or Montclair address, until sometime in May 1962, when defendant took the child to New York with her.

The burden of establishing the fact of domicile is upon the party who relies on it. Lea v. Lea, 18 N.J. 1 (1955). A domicile of choice has been said to be essentially a question of residence and intentions. Collins v. Yancey, 55 N.J. Super. 514 (Super L.D. 1959). It is generally recognized that the two requisites without which no domicle of choice could be established are (1) physical presence, and (2) the concomitant unqualified intention to remain permanently and indefinitely. Gosschalk v. Gosschalk, 48 N.J. Super. 566 (Super A.D. 1958), Aff. 28 N.J. 73 (1958).

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> a New Jersey resident parent is his most suitable custodian. See Matflerd v. Matflerd 10 N.J. Super. 132 (App. Div. 1950)."

This court concludes on this issue that from the testimony it has heard that this court has jurisdiction to hear this matter.

III

A

The next inquiry is whether this court can assert jurisdiction in this matter as a court in New York has before it an action commenced prior to this action wherein the parties herein are reversed and which action also has for its determination the question of custody.

It is important therefore to examine the proceedings in the New York Court from its inception to the time the petition by the defendant was filed in this court on September 19, 1962.

According to the defendant in this action, she instituted a suit against the plaintiff herein in the Supreme Court of the State of New York. On June 21, 1962 an order of Sequestration was signed by Supreme Court Justice Francis X. Conlon, attaching the assets of the plaintiff herein located in the State of New York. Evidently whatever assets the plaintiff herein had in New York were sequestered and a receiver was appointed.

As previously stated it has been admitted by the defendant herein and stipulated between the parties that plaintiff herein was never served personally in the State of New York with the summons and complaint in the New York action. He was served with these papers in the City of Paterson, Passaic County, New Jersey on July 2, 1962.

It next appears that, on July 12, 1962, an order to show cause was signed by Justice John L. Flynn (D-3 in Evid.) for a hearing on July 23, 1962 in said court why an order should not be made and entered in said matter:

"1. Granting temporary custody of the infant Philip Lewis Joffe, issue of the parties herein, to the plaintiff, pending the trial of the within action.

2. Granting alimony pendente lite to the plaintiff and support for the infant above in the sum of $500. per week.

3. Granting counsel fees in the sum of $5,000. to the plaintiff for the purpose of prosecuting the within action for a separation, and for such other and further relief as to this Court may seem just and proper in the premises."

The order also sets forth the manner of service and granted temporary custody of the infant child and certain restraints relating to the plaintiff and infant in the Montclair home also relative to the Montclair property.

The plaintiff herein by motion appeared specially before the New York Court "for an order vacating and setting aside the summons and complaint and order to show cause, pursuant to Section 237-a of the Civil Practice Act, on the ground that this Court does not have jurisdiction of the subject matter of this action and that defendant is a person not subject to the jurisdiction of this Court and for such other and further relief as may seem just and proper in the premises".

Section 237A of the New York Civil Practice Acts provides:

"1. Except as otherwise provided in subdivision two, a defendant may make a special appearance solely to object to the court's jurisdiction over his person. Such objection, whether based on the ground that process or its service is insufficient or that the defendant is a person not subject to the jurisdiction of the court, must be raised by a motion to set aside the service of process or to strike out part of the complaint, as may be appropriate. The objection if raised in a manner other than that provided in this section or if combined with an objection to the merits, except as otherwise provided in subdivision four, shall be deemed waived.

2. An objection to the court's jurisdiction over the person of the defendant shall not be waived by joining therewith a motion objection to the court's jurisdiction over the subject matter.

3. If the plaintiff on the hearing of the motion shall by affidavit deny the facts alleged by the defendant or state facts tending to obviate the objection, the court may:

(a) hear and determine the objection and where the court has no jurisdiction over any cause of action stated in the complaint, the court shall order the service set aside; however, where process and its service are sufficient to give the court jurisdiction over one or more of the causes of action stated in the complaint, the court shall order struck out of the complaint such part of it, including all or part of a prayer for relief, as is beyond the court's jurisdiction, in which case the complaint will be deemed amended accordingly, or the court may order an amended complaint to be served; or

(b) direct that the questions of fact, which shall be clearly and succinctly stated in the order, be tried by a jury or referee, the findings of fact of which shall be reported to the court for its action; or

(c) overrule the objection, and in its discretion allow the same facts to be alleged in the answer as a defense.

4. After a motion made pursuant to this section has been denied, the defendant may litigate the action on the merits without being deemed to have waived his objection to the court's jurisdiction over his person.

5. A notice of the motion made pursuant to this section, if served within twenty days after service of the complaint and made returnable within ten days thereafter, or, if there be no sitting of court within ten days, then for the first term or sitting of court thereafter at which the motion can be heard,

shall operate to stay all further proceedings in the action until the expiration of ten days after service of a copy of the order deciding the motion and a written notice of the entry thereof; provided, however, that the court may in its discretion vacate or modify the stay on motion made upon notice to the opposing party. If the motion is denied, the defendant may serve an answer, as a matter of right, before the expiration of ten days after service of a copy of the order deciding the motion and a written notice of the entry thereof."

Justice Arthur G. Klein who heard this motion rendered a decision on September 11, 1962 which is D-4 in evidence. It is repeated here in its entirety as several orders purporting to be in conformity therewith have been entered.

KLEIN, J.:

"Plaintiff has commenced an action for separation and in connection therewith now moves for alimony pendente lite and counsel fees. By separation motion (No. 6, August 27, 1962) defendant-husband appears specially and seeks to vacate and set aside service of process upon him pursuant to section 237a of the Civil Practice Act. From a reading of the voluminous affidavits submitted, although there appears to be some conflict with respect to exactly where the parties maintained their principal residence, if any, sufficient competent proof has been set forth herein to readily indicate that plaintiff satisfies the jurisdictional requirements with respect to New York residence outlined in section 1165a, subdivision 3 of the Civil Practice Act, without the necessity of conducting a formal hearing thereon before the court or a referee with the attendant delay that such a hearing might entail. The motion to vacate service of process is, accordingly, denied with leave to defendant to serve his answer or otherwise move with respect to the complaint within 10 days after service of a copy of the order to be settled herein with notice of entry thereof. Leave is also granted defendant to serve his answering affidavits in oppo-

sition to the motion for temporary alimony within the aforedescribed 10-day period. The motion to vacate service having been denied, plaintiff's motion (No. 7, August 27, 1962) for a vacatur of the stay has been rendered academic by virtue of said denial and same is, accordingly denied.

"Pending the coming in of defendant's answering affidavits, disposition of the motion in chief for alimony pendente lite and counsel fees will be held in abeyance. In the interim, the receiver of defendant's sequestered funds is directed, upon service of a copy of the order to be settled herein with notice of entry thereof, to pay all mortgage and tax payments recently due and/or about to become due on the jointly owned home of the parties, together with the payments currently due for the recent kitchen repairs. The receiver is further directed to pay out of the sequestered funds in his possession the sum of $65. per week for the support of the infant issue of the parties, inclusive of the salary of the nursemaid."

On September 25, 1962 an order was entered by Justice Klein in conformity with his decision of September 11, 1962 (D-5 in evidence). In this order it is recited that "and the defendant having appeared specially by notice of motion dated the 14th day of August, 1962, seeking to vacate and set aside the service of all process herein and to vacate the summons and complaint pursuant to section 237a of the Civil Practice Act on the ground that this court does not have jurisdiction."

Much is made by the defendant herein of a letter dated September 19, 1962, addressed to Justice Arthur G. Klein by Benjamin M. Lechenstein, an attorney at Law of the State of New York, who represented the plaintiff herein in the New York action. This letter is part of Exhibit D-6 in evidence. There was nothing in that letter nor in the decision of Justice Klein, pursuant thereto, which in the opinion of this Court would justify a finding that the plaintiff

herein was arguing the matter before Justice Klein upon its merits.

The finding by Justice Klein that he had jurisdiction in the matter before him, where no personal service had been made upon the plaintiff herein, does not foreclose this court in its relation to our social institutions in accord with the public policy of this state. Fantony v. Fantony, Supra; Lea v. Lea 18 N.J. 1, 7 (1955); Untermann v. Untermann, 19 N.J. 407, 416 (1955) and the United States Supreme Court decisions cited therein.

At this juncture, it is therefore quite apparent from Justice Klein's decision that plaintiff herein has appeared specially in accordance with the Civil Practice Act of New York. His decision tells this court that the plaintiff therein, by the voluminous affidavits filed by both parties, relative to residence, satisfied *that* Court as to the jurisdictional requirements with respect to New York residence outlined in section 1165a, subdivision 3 of the Civil Practice Act. It made no determination of the domicile or residence of Sidney H. Joffe, the plaintiff herein.

This Court therefore finds that the plaintiff herein did enter a special appearance to contest the jurisdiction of the New York Court and did nothing in his appearance before Justice Klein to make a finding that he submitted generally to the New York Court.

It is to be noted that this Court on September 21, 1962 signed an order restraining defendant herein from proceeding with her New York Action. It is quite apparent that when this Court advised both attorneys in this matter that it desired to take oral testimony pursuant to R.R. 4:44-4 and the Court probably mentioned that it had to ascertain whether the appearance of the plaintiff herein had been a general appearance as alleged by the defendant herein, that she set in motion in the New York Court proceedings which she believed would bolster her claim that the New York Court had in personam jurisdiction of the plaintiff herein.

The affidavit she filed with this court on January 30, 1963 in opposition to an order to show cause why she should not be held in contempt is most illuminating.

> "It is also important to note that when my attorney, Mr. Ratner, after a conference in chambers with opposing counsel and Justice herein, advised me to have my lawyer in New York immediately get an exemplied copy of the declaration by the New York Courts of a general appearance, I requested him to request the New Jersey Court to either lift the stay or get permission of the New Jersey Court to do so, just as Mr. Chodash, my previous attorney, had done. He told me to have my New York attorney get in touch with him.
>
> "Accordingly, I told my New York attorney what Mr. Ratner had told me and when a few days later my New York attorney asked me to sign the affidavit, I assumed and I had the right to assume that both attorneys were proceeding in accordance with my request. I know that on several occasions my attorney, while with me, attempted to contact Mr. Ratner for the purpose of obtaining such permission as Mr. Chodash had done and I had the right to assume that my lawyers were at all times acting in coordination and with respect to the Court. It is now my belief that Mr. Rothman proceeded to request a declaration from the Court inadvertently omitting to check with Mr. Ratner in the rush of the Christmas vacation. Both of my attorneys further advised me when I asked them how come I was served with a contempt order that obtaining a finalization and declaration of existing facts is not a contempt.
>
> "After receiving the order to show cause for contempt I instructed my New York attorney to desist from the motion as I felt that we had sufficient law to defeat the motion in New Jersey, but Mr. Rothman refused to abide by my decision as more fully appears by an exemplified copy of his New York affidavit being filed simultaneously herewith with

this Court, and I cannot be made responsible for his acts."

The affidavit of her New York attorney, Jesse Rothman, Exhibit D-2 in evidence, is also interesting. Starting with the second paragraph on page 2, he states:

> "Said Justice had previously advised plaintiff's New Jersey attorney, Mr. Codash, that he was interested in knowing whether there was a general appearance in New York as such an appearance would materially affect his decision. The declaration of the status of a lawsuit is not moving it to trial.
>
> "The order to show cause herein obtained by defendant's New Jersey attorney with which he hopes to stay plaintiff herein from submitting this motion on the 8th of January, 1962. PURPOSEFULLY FAILS TO ADVISE MR. JUSTICE CONCILIO (who signed it) THAT THE MOTION RETURNABLE JAN. 8, 1962, IS FOR A DECLARATION OF WHETHER THERE HAS BEEN A GENERAL APPEARANCE BY DEFENDANT IN THE NEW YORK ACTION - the very point the Justice was interested in learning. Said petition purposefully stated that
>
> > 'defendant' (plaintiff herein) presented to the Supreme Court of the State of New York. . . . . .in the action instituted by her in. . . . .New York an 'Order for Pendente Lite Relief' and 'a notice of motion based upon her affidavit attached thereto.'
>
> "NOWHERE do the said papers indicated in any way the purpose of plaintiff's motion herein was for a finding on the status of defendant in the New York Court - a finding which could be made only in the New York Courts - WHICH status was a material issue TO THE PROPER CONSIDERATION AND DECISION of the motion before the same Justice in the State of New Jersey and said Justice had so stated.
>
> "Furthermore according to my client when Justice Concilio had requested to know if there had been a general appearance by defendant in the New York

Courts - defendant's New Jersey attorney (plaintiff in the New Jersey action) had stated in bad faith that there had not."

On December 4, 1962, a decision of Justice Klein, Exhibit D-7 in Evidence was entered. Here again, other things, he stated: "Defendant appeared specially and moved to set aside service of process herein."

On December 12, 1962, an order was signed by Justice Klein, Exhibit D-8 in Evidence. This order recites the previous proceedings which were had before him and in conformity with his previous decisions. However on page two thereof appears these words: "after the vacating of his special appearance". This court has examined his decisions very carefully and cannot find any such determination therein. This order, by the way, directs, among other things, payment of counsel fees, and custody of the infant child.

The defendant herein next appears before Justice Frederick E. Backer, for him to make a determination whether plaintiff herein had entered a general appearance in the New York matter. This hearing was ex parte. The plaintiff herein did not appear, nor participate therein. This court has, with the help of the voluminous file the defendant herein furnished to it, which by the way is not what the court requested, examined the matters listed in the Justice's order. Exhibit D-1 in Evidence. This court finds that there is nothing in said file, nor that plaintiff herein, either himself or by his New York attorney, which would indicate that he entered a general appearance by participating in the case actively and arguing it on the merit. *Hammond v. Hammond,* 190 N.Y.S. 2d 739 (Sup. Ct. A.D. 1959) and the cases cited therein. See also *Lynch v. Pleach,* 167 N.Y.S. 2d 885 (Sup. Ct. 1957), Aff. 168 N.Y.S. 2d 620, (1957) relative to motion to vacate a warrant of attachment and service of summons and complaint. This court also finds that the findings of Justice Backer is not res judicata and that this court is not bound thereby as it is not such a finding that this court has to give full faith and credit to it under the U.S. Constitution. See *Edwards v. Edwards supra.*

This court further examined the file of the defendant herein, referred to above, to ascertain if it could, what transpired at the hearing before Justice Thomas A. Aurelio on November 4, 1963. The judgment entered as a result of that hearing, which was ex parte, is Exhibit D-10 in Evidence. The transcript of that hearing is most enlightening. On page 5 of the transcript there appears:

> "MR. ROTHMAN: At this time, if your Honor please, I would like to offer in evidence Judge Klein's order in this court dated September 25, 1962, with respect to domicile and residence.
>
> THE WITNESS: That is Judge Backer's order.
>
> MR. ROTHMAN: That is Judge Backer's order, if your Honor please, determining that the defendant had appeared generally and that the domicile and residence are within the State, this State.
>
> THE WITNESS: Determining that he had in person jurisdiction, my husband. That was an order of general appearance.
>
> MR. ROTHMAN: I would like to offer that, if I may, your Honor.
>
> THE COURT: Where was he served?
>
> MR. ROTHMAN: In New Jersey.
>
> THE COURT: The order will be marked in evidence here. I think I have it.
>
> THE WITNESS: If your Honor please, may I tell the things preceding that so you know what is going on?
>
> THE COURT: I just want to make a proper record here.
>
> THE WITNESS: Because I am a lawyer, I am able to do that.
>
> THE COURT: I understand that. Did you say the September 25th order of Judge Klein?
>
> MR. ROTHMAN: No, this is an order of Judge Backer.
>
> THE WITNESS: At this time I will offer the orders in evidence that we are going to offer. It may help you to understand the background.

After we served the summons and complaint in this action, the defendant came in and made a motion to vacate the service of the summons and complaint on the ground that he didn't believe that the domicile was in the State of New York."

On page 12 of transcript there appears:

THE COURT: Put Judge Backer's order in evidence. *It seems to me that a Justice of this court has already ruled on the question and I cannot overrule him.* The remedy was by an appeal to the Appellate court. There was no appeal from this order. Am I right in that?

MR. ROTHMAN: No, your Honor.

THE COURT: And this order stands?

MR. ROTHMAN: That is right. It is the law of the case.

THE COURT: Then let the order be deemed marked in evidence.

(Order by the Honorable Frederick E. Backer, dated January 11, 1963, received in evidence and deemed marked plaintiff's Exhibit 1.)

THE COURT: *If you have the order of Judge Backer, I think I am bound by it at this point.*

It is to be noted that Justice Aurelio felt bound by an order of his associate on the bench, Justice Backer. It is also to be noted from that testimony that the orders signed by Justice Klein were never presented to Justice Aurelio when he heard this matter ex parte.

(C) This Court is not too impressed with the contention made by the defendant herein that since she commenced an action in the New York Court, prior to the time the defendant commenced his action here, it should have priority. Where the courts have held this principle to apply, it was based upon a finding by the New Jersey Court that the foreign court first obtained jurisdiction both over the subject matter and over the parties. *Stultz v. Stultz,* 15 N.J. 315 (1954); *Hammer v. Hammer,* 36 N.J. Super. 265 (App. Div. 1955), *Edwards v. Edwards supra.*

This court finds that the New York Supreme Court did not have jurisdiction of both parties.

This court therefore concludes it has jurisdiction to hear the matter before it. The motion to dismiss the complaint is accordingly denied and the restraint of the plaintiff entered herein is vacated.

IV

The motion by the defendant herein to vacate an order dated August 14, 1962 and a supplemental order thereto are both denied.

The restraints previously entered in this matter against the defendant are continued.

Justice Oliphant speaking for our Supreme Court in *Stultz v. Stultz, supra*, stated:

> "Where there is a voluntary submission to the foreign jurisdiction there is no ground for intervention by the New Jersey courts, or rather there is no ground unless there be a special equity justifying such relief notwithstanding the appearance. The policy of this court with respect to the exercise of such equitable jurisdiction in situations as here presented was stated by Mr. Justice Heher in *O'Loughlin v. O'Loughlin*, 6 N.J. 170, pp. 178, (1951):
>
> > "There can be no doubt of the power of a court of equity to impose restraints upon persons within the control of its process against action beyond the State. Ordinarily, a citizen of a State may go abroad for such remedies and relief as may be available in the jurisdiction of his choice, but a court of equity has the undoubted power to enjoin those subject to its jurisdiction from seeking relief in a foreign proceeding which would not be compatible with equity and right conscience. The restraint is directed against the litigants, not the foreign jurisdiction. It constitutes an exercise of equity's jurisdiction in personam operative upon those within the reach of the court's process. The remedy of injunction acts in personam. But though

> the power is unquestionable, its exercise is often one of great delicacy; it is a remedy that is sparingly used, to serve the ends of justice in the particular case. Considerations of comity forbid interference with the prosecution of a proceeding in a foreign jurisdiction capable of affording adequate relief and doing complete justice, unless there be a special equity sufficient in conscience to stay the hand of the defendant. The question is not the existence of the power but the propriety of its exercise in a given case. The rule of comity is grounded in the policy or avoiding conflicts of jurisdiction, unless upon strong grounds, and the general principle that the court which first acquires jurisdiction of the issue has precedence." Cf. Goodrich on Conflict of Laws (1949), sec. 78, p. 219; Strumberg on Conflict of Laws (2d ed. (1951), pp. 71, 73, 100, 104.
>
> "We specifically indicated our adherence to this doctrine in the following cases: *Peff v. Peff,* 2 N.J. 513, 521, 522 (1949); *O'Loughlin v. O'Loughlin, supra; Staedler v. Staedler,* 6 N.J. 380, 392 (1951); *Robison v. Robison,* 9 N.J. 288, 291 (1952); *Isserman v. Isserman,* 11 N.J. 106, 113 (1952)."

To recapitulate this Court concludes (1) that plaintiff, Sidney H. Joffe, is domiciled in New Jersey and that his son, Philip Lewis Joffe, was born in New Jersey and remained in New Jersey until his mother, the defendant herein, removed him to New York; (2) that this court has jurisdiction to decide the issue of custody and (3) that full faith and credit need not be given to the proceedings commenced by the defendant herein in the Supreme Court of New York as the plaintiff herein was never served with process in New York, never appeared generally, nor did he actively participate or argue the merits of that action.

The motions made by the defendant are denied and the restraint previously entered by this court against plaintiff is vacated.

Now, several orders to show cause why the defendant herein should not be held in contempt have not been heard by me. The reasons being that I felt that the motions made by the defendant herein should be decided first and that since I signed most of the orders that I should disqualify myself from hearing the same.

When I wrote this opinion I was of the opinion that I was still going to be assigned to hear other matrimonial matters. Judge David Nimmo has been assigned by the Chief Justice to hear these motions. Now, as Judge Duffy has been assigned to hear matrimonial matters in this county, probably both of you should communicate with him and get an early date.

This court also wants to remind the defendant herein that she has filed no answer. She should do so in accordance with the rules of our court.

Let an appropriate order be submitted to the court either by consent or by motion.

MR. RUBENSTEIN: In other words, contempt motions are being assigned to Judge Nimmo unless it is reassigned to Judge Duffy?

THE COURT: Yes.

MR. RATNER: May I at this time ask your Honor to make a ruling or enter an order that the matters of contempt be suspended unless the court of appeals—I say this respectfully—determines the propriety or the correctness of your rulings that this court has jurisdiction over the parties in the suit of plaintiff against the defendant?

THE COURT: I think you can make that. I think you can. I don't think you make that motion before me. I think you make that before the appellate division.

MR. RATNER: I have got to make it first here and then to the appellate division.

THE COURT: Well, to facilitate matters I will deny it. You get what I mean?

MR. RATNER: Yes. I will present the order.

MR. RUBENSTEIN: Oral motion was made and denied.

MR. RATNER: Right, for a stay.

MR. RUBENSTEIN: You made an oral application and was denied.

MR. RATNER: The court must know the purpose of the stay.

MR. RUBENSTEIN: Yes, I understand.

MR. RATNER: All right.

May at this time respectfully ask the court for a reasonable counsel fee for the services rendered to this lady in this extensive and voluminous litigation?

THE COURT: I will not allow any counsel fee at this time. I think it should abide, wait until the issue is finally determined.

MR. RATNER: Then may I reserve the right to come back to whatever judge is then sitting, if it be the proper procedure, to renew my application for a fee before him?

THE COURT: You always have that right.

MR. RATNER: No question since by right to come back to you to make the application.

THE COURT: Anything that I have decided here in Passaic County unfortunately I still have control over it. It isn't like in New York. You make the motion over in Morris County.

MR. RATNER: As long as I know where I am going that is all.

THE COURT: Well, that is something that I don't know.

MR. RATNER: I mean that I can make the application to you.

THE COURT: That's right.

APPENDIX C

ORDER OF CONTEMPT OF JUDGE VINCENT C. DUFFY ENTERED IN SUPERIOR COURT OF NEW JERSEY, CHANCERY DIVISION, SIDNEY H. JOFFE, PLAINTIFF V. GUSSIE JOFFE, DEFENDANT, DOCKET NO. M 6660-61, ENTERED OCTOBER 20, 1964

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, PASSAIC COUNTY
DOCKET NO. M 6660 61

SIDNEY H. JOFFE, Plaintiff,	)	
v.	)	CIVIL ACTION
GUSSIE JOFFE, Defendant.	)	ORDER OF CONTEMPT

This matter being opened to the court by J. Mortimer Rubenstein, Esq., attorney for plaintiff, in the presence of Benjamin Ratner, Esq., attorney for defendant, and it appearing to the court that, by an Order made in this action on the 11th day of August 1964, the said defendant was ordered to show cause at the Chancery Chambers in the City of Paterson, why she should not be adjudged guilty of contempt of this court as charged and punished therefor, and for other relief, and the court having read and considered the Affidavits of the plaintiff filed herein, and heard and considered the argument of counsel, and it now appearing that the said Gussie Joffe is guilty of the contempt charged in that she has willfully violated the Orders of this court mentioned in said Petition;

And it further appearing that the various Orders violated by the defendant as set forth in said Petition of the plaintiff, were duly served upon the defendant and she had knowledge of the contents thereof, and it further appearing

that the court has personal jurisdiction over the defendant, Gussie Joffe, and good cause appearing therefor:

It is on this 20th day of October 1964, ORDERED and ADJUDGED, that the said Gussie Joffe is guilty of civil contempt of this court, in that she has willfully violated the Order for Temporary Restraint entered in this cause on September 21, 1962, which restrained the defendant, her agents, servants and attorneys from proceeding in any manner whatsoever with a suit instituted by the said defendant in the Supreme Court of the State of New York, County of New York, Special Term, Part No. 12, Index 30789, 1962, and the Orders of Restraint contained in the Orders of this court dated January 4, 1963, August 14, 1963, November 24, 1963; February 20, 1964 and March 16, 1964.

It is further ORDERED, that the said Gussie Joffe, be committed to the County Jail of the County of Passaic, or to such other jail in this State wherein she may be apprehended, and there remain charged with her contempt until she shall vacate any Orders or Judgments obtained by her in the action instituted by her in the Supreme Court of the State of New York, County of New York, Special Term, Part No. 12, Index 30789, 1962, which Orders or Judgments were taken, instituted or obtained on and after September 21, 1962, and to also pay to the Clerk of this court a fine of $25.00 to the use of the State, unless the court shall see fit sooner to discharge her.

It is further ORDERED, that the said defendant, Gussie Joffe, forthwith take all necessary actions to vacate any orders or judgments obtained by her in the action instituted by her in the Supreme Court of the State of New York as above set forth, which Orders or Judgments were taken, instituted or obtained on and after September 21, 1962.

It is further ORDERED, that the warrant for the apprehension of the said defendant in accordance with this Order shall not issue until the further order of this court in order to give the defendant time within which to vacate the Orders and Judgments obtained by her in the said proceedings in

the Supreme Court of the State of New York as above set forth, which Orders or Judgments were taken, instituted or obtained on and after September 21, 1962, and that if proof be made to this court within 30 days following the date hereof, that the said defendant, Gussie Joffe, shall have failed and neglected to vacate said Orders and Judgments as above set forth, the plaintiff may take an Order, without notice, that a warrant issue for the commitment of the defendant as aforesaid.

It is further ORDERED, that custody of the infant child of the marriage, Philip Lewis Joffe, be and the same is hereby awarded to the plaintiff, Sidney H. Joffe, pendente lite and until the further order of the Court, the defendant to have rights of reasonable visitation with said infant child.

It is further ORDERED, that if the parties cannot agree upon said visitation and upon application of either party to the Court, for it to fix the terms and conditions of said visitation.

s/ VINCENT C. DUFFY
J.S.C.
Temporarily Assigned

Nov. 12, 1964

SECOND ORDER OF CONTEMPT FILED IN SUPERIOR COURT OF NEW JERSEY

This matter being opened to the court by J. Mortimer Rubenstein, Esq., attorney for plaintiff, and in the presence of Benjamin M. Ratner, Esq., attorney for defendant, and it appearing to the court that by Orders made in this action on January 4, 1963, August 14, 1963, September 24, 1963, November 21, 1963, February 20, 1964, March 16, 1964 and July 13, 1964, the said defendant was ordered to show cause why she should not be adjudged guilty of contempt of this court as charged in the Petitions dated January 4,

1963, August 14, 1963, September 24, 1963, November 21, 1963, February 20, 1964, March 16, 1964 and July 13, 1964, respectively, and punished therefor, and for other relief, and upon various Notices of Motion filed by the defendant to strike said Petitions and Orders to Show Cause, and the court having read and considered the Affidavits of the plaintiff filed herein and of the defendant, and heard and considered the argument of counsel, and it now appearing that Gussie Joffe is guilty of the contempt charged in that she has willfully violated the Orders of this court mentioned in said Petitions;

And it further appearing, that the various Orders violated by the defendant as set forth in said Petitions of the plaintiff, were duly served upon the defendant and she had knowledge of the contents thereof, and good cause appearing therefor:

It is on this 12th day of November 1964, ORDERED and ADJUDGED, that the said Gussie Joffe is guilty of civil contempt of this court in that she has willfully violated the Order for Temporary Restraint entered in this cause on September 21, 1962 which restrained the defendant, her agents, servants and attorneys from proceeding in any manner whatsoever with the suit instituted by the said defendant in the Supreme Court of the State of New York, County of New York, Special Term, Part No. 12, Index 30789, 1962, and the Orders of Restraint contained in the Orders of this court dated January 4, 1963, August 14, 1963, November 21, 1963, February 20, 1964 and March 16, 1964, and of the Order of this court entered December 19, 1962 insofar as it granted to the plaintiff visitation with the infant child of the marriage.

It is further ORDERED, that the defendant, Gussie Joffe, pay to the Clerk of this court a fine of $2,500.00 to the use of the State by virtue of her violation of the Order of this court entered December 19, 1962 insofar as is granted to the plaintiff visitation with the infant child of the marriage, and the sum of $500.00 to the use of the State for

her violation of the various Orders of Restraint as above set forth.

It is further ORDERED, that the defendant, Gussie Joffe, forthwith take all necessary actions to vacate any orders or judgments obtained by her in the action instituted by her in the Supreme Court of the State of New York, as above set forth, which orders or judgments were taken, instituted or obtained on and after September 21, 1962.

It is further ORDERED, that, in the event the said defendant shall fail to pay the said fines as above set forth and shall have failed to vacate the Orders and Judgments obtained by her in said proceedings in the Supreme Court of the State of New York as above set forth, which Orders or Judgments were taken, instituted or obtained on and after September 21, 1962, within 30 days following the date hereof, and upon filing of proof with this court that said action has not been taken within this time, the said Gussie Joffe be committed to the County Jail of the County of Passaic, or to such other jail in this State wherein she may be apprehended, and there remain charged with her contempt until she shall have vacated any Orders or Judgments obtained by her in the action instituted by her in the Supreme Court of the State of New York, County of New York, Special Term, Part No. 12, Index 30789, 1962, which Orders or Judgments were taken, instituted or obtained on and after September 21, 1962 and shall have paid the fines to the Clerk of this court as above set forth, unless the court shall see fit sooner to discharge her.

It is further ORDERED, that the defendant's motions to strike the various Orders to Show Cause issued in this matter as above set forth, be dismissed.

s/ DAVID A. NIMMO
J. S. C.
Temporarily Assigned

APPENDIX D

Memorandum Decision of New York Supreme Court (Justice Klein) Denying Husband's Motion to Dismiss for Lack of Jurisdiction and Finding Jurisdiction in New York (September 17, 1962)

Joffe vs. Joffe—Plaintiff has commenced an action for separation and in connection therewith now moves for alimony pendente lite and counsel fees. By separate motion (No. 6, August 27, 1962) defendant-husband appears specially and seeks to vacate and set aside service of process upon him pursuant to section 237a of the Civil Practice Act. From a reading of the voluminous affidavits submitted, although there appears to be some conflict with respect to exactly where the parties maintained their principal residence, if any, sufficient competent proof had been set forth herein to readily indicate that plaintiff satisfies the jurisdictional requirements with respect to New York residence outlined in section 1165a, subdivision 3 of the Civil Practice Act, without the necessity of conducting a formal hearing thereon before the court or a referee with the attendant delay that such a hearing might entail. The motion to vacate service of process is, accordingly, denied with leave to defendant to serve his answer or otherwise move with respect to the complaint within ten days after service of a copy of the order to be served herein with notice of entry thereof. Leave is also granted defendant to serve his answering affidavits in opposition to the motion for temporary alimony within the aforedescribed ten-day period. The motion to vacate service having been denied, plaintiff's motion (No. 7 August 27, 1962) for a vacature of the stay has been rendered academic, by virtue of said denial and the same is accordingly, denied. Pending the coming in of defendant's answering affidavits, disposition of the motion in chief for alimony pendente lite and counsel fees will be held in abeyance. In the interim, the receiver of defendant's seques-

tered funds is directed, upon service of a copy of the order, to be settled herein with notice of entry thereof, to pay all mortgage and tax payments recently due and/or about to become due on the jointly owned home of the parties, together with the payments currently due for the recent kitchen repairs. The receiver is further directed to pay out of the sequestered funds in his possession the sum of $69. per week for the support of the infant issue of the parties, inclusive of the salary of the nurse-said. Settle order.

Joffe vs. Joffe—Motion is disposed of in accordance with determination of companion motion decided simultaneously herewith.

ARTHUR G. KLEIN

Dated September 17, 1962

APPENDIX E

Order Granting Support and Counsel Fees Pendente Lite and Custody, etc. (New York Supreme Court–Justice Klein–December 12, 1962)

Plaintiff having moved this Court for an Order allowing her a counsel fee herein and awarding her custody of the infant issue of the marriage between the parties herein during the pendency of this action and for temporary alimony for the maintenance and support of said infant, and for such other and further relief as to this Court may seem just and proper and said motion having come on regularly to be heard by notice of motion,

Now, on reading and filing the order to show cause, dated July 12, 1962, the affidavits of Gussie Joffe, sworn to June 1, 1962, Yvonne Edwards, sworn to May 24, 1962, Taft Jones, sworn to June 18, 1962, Jesse Rothman, sworn to July 11, 1962, Svala Kristensdottir, sworn to June 15, 1962 and all the supporting papers attached hereto, as well as all of the exhibits attached hereto and upon the summons and complaint and upon the defendant's notice of motion to vacate service of process dated August 14, 1962, and upon the affidavit of Sidney H. Joffe sworn to on August 14, 1962, together with the exhibits thereto in support of said motion, and upon notice of cross-motion of the plaintiff dated August 17, 1962 together with the affidavit of Gussie Joffe, sworn to on August 15, 1962, together with the exhibits, and the affidavits of Taft Jones, Jr., sworn to August 16, 1962; and the affidavit of Lee Kleiman, sworn to August 16, 1962, and the supplemental affidavit of Gussie Joffe, sworn to August 20, 1962 and the supplemental affidavit of Gussie Joffe, sworn to August 27, 1962, in opposition to defendant's motion and upon the affidavit of Jesse Rothman, sworn to August 24, 1962 in support of plaintiff's cross-motion and upon the reply affidavits of Sidney H. Joffe, sworn to August 22 and August 23, 1962, respectively and upon the affidavit of Benjamin M. Lichten-

stein, sworn to August 23, 1962 in opposition to plaintiff's cross-motion; and upon the Order of this Court dated September 25, 1962, and defendant's motion having been denied, and defendant having moved for reargument and reargument having been granted and motion denied and defendant having been granted leave to serve his answer or otherwise move with respect to the complaint within ten days after service of a copy of the order to be settled therein and defendant, after the vacating of his special appearance, having been granted leave within the ten day period aforesaid to serve his formal answering affidavits in opposition to the motion for alimony pendente lite and defendant's application for reargument having been denied (Sept. 25, 1962) and a copy of the order denying the motion to vacate the proceedings having been served upon his counsel on September 27, 1962 and the time within which defendant was to serve the formal answering affidavits having long since expired, and defendant having failed to submit any answer and disposition of the motion having heretofore been held in abeyance pending the coming in of defendant's formal answering affidavits, and due deliberation having been had herein and the opinion of the Court having been duly filed, and

Now on motion of Jesse Rothman, attorney for the plaintiff herein, it is

Ordered, that the motion for alimony and counsel fees is granted on default, and it is further

Ordered, that the defendant be and he hereby is directed to pay to the plaintiff, at the office of her attorney, Jesse Rothman, 475 Fifth Avenue, New York, New York, the sum of $2,500 as and for counsel fee herein, one-half of which sum is directed to be paid within fifteen days after

service of a copy of this order with notice of entry thereof and the balance when the cause appears on the Ready Calendar, and it is further

ORDERED, that custody of the infant Philip Lewis Joffe the issue of the marriage between the parties hereto, be and the same hereby is awarded to the plaintiff, until the final order of this Court, and it is further

ORDERED, that the defendant be and he hereby is directed to pay to the plaintiff at 475 Fifth Avenue, New York, New York the sum of $275 per week alimony during the pendency of this action for the support and maintenance of said infant and herself which payments are to commence from the original return day of the motion herein, the 22nd day of July, 1962, and it is further

ORDERED, that in addition to the foregoing, the defendant is directed to continue making all mortgage and tax payments due and to become due on the home owned by the entirety by the parties, said payments to be made directly to the plaintiff by check made payable to the mortgagee and/or to the Tax Department, of the City of Montclair, or to the mortgagee, whichever way the mortgagee requires, and it is further

ORDERED, that the defendant be and he hereby is granted the right of visitation of the said infant as follows:

Defendant shall have reasonable rights of visitation at the home of the plaintiff, 44 East 67th Street, New York, New York every Sunday from 9 to 5.

ORDERED, that a copy of this order herein be served upon the receiver of defendant's sequestered property.

ORDERED, that this order or decree may be enforced or modified only in the New York State Supreme Court.

ENTER

A. G. K.
J.S.C.

APPENDIX F

SUPREME COURT OF THE STATE OF NEW YORK

Order Declaring General Appearance (New York Supreme Court—Justice Backer—January 11, 1963)

Plaintiff having moved this Court for an order adjudging and determining that the defendant herein by appearing, moving and arguing on the merits of this law suit and by becoming an actor herein, has participated on the merits and submitted to the general jurisdiction of this Court, though he labelled his appearance as "appearing specially" and that this Court has now personal jurisdiction over him, and for such other and further relief as to this Court may seem just and proper, and said motion having come on to be heard by notice of motion.

Now, on reading and filing the notice of motion dated December 24, 1962, the affidavit of Gussie Joffe, sworn to the 25th and 28th days of December, 1962 and the affidavit of Jesse Rothman, duly sworn to the 3rd and 7th days of January 1963 and upon all of the proceedings heretofore and herein and upon all of the papers filed in the office of the County Clerk indexed as No. 30789/1962 in the case of Joffe v. Joffe and particularly the Plaintiffs:

Plaintiff's:

Order of sequestration dated the 21st day of June, 1962 signed by Mr. Justice Francis X. Conlon with attached affidavits of Gussie Joffe, Jack Kleiman, duly sworn to the 18th day of June, 1962.

Order to show cause for alimony and counsel fees and custody of the infant dated the 12th day of July, 1962 signed by Mr. Justice Flynn, the affidavits of Gussie Joffe, sworn to June 1, 1962, Yvonne Edwards, sworn to May 24, 1962, Taft Jones, sworn to June 18, 1962, Jesse Rothman, sworn to July 11, 1962, Svala Kristenscottir, sworn to June 15, the

summons and complaint, with supporting papers and exhibits.

Order to show cause dated August 8, 1962, signed by Miss Justice Birdie Amsterdam and the affidavits attached of Gussie Joffe, sworn to the 24th days of July, 1962, for permission to withdraw funds from sequestered assets of defendant, the supplementary affidavits thereto sworn to the 24th day of August, 1962, signed by Gussie Joffe.

Defendant's:

Notice of motion to vacate service of process dated August 14, 1962 together with affidavits of Sidney H. Joffe sworn to August 14, 1962 with exhibits questioning jurisdiction of the person and subject manner.

Plaintiff's:

Cross-motion dated August 17, 1962 to vacate any stay together with affidavit of Gussie Joffe, sworn to August 15, 1962, Taft Jones, Jr., sworn to August 16, 1962, Lee Kleiman, sworn to August 16, 1962 and two supplemental affidavits of Gussie Joffe sworn to August 20th and 27th, 1962, in opposition to defendant's motion and affidavit of Jesse Rothman, sworn to August 24, 1962, in support of plaintiff's cross-motion and

Defendant's:

Two affidavits of defendant sworn to August 22, 1962 and the affidavit of Benjamin M. Lichtenstein, sworn to August 23, 1962, the affidavit of Sidney H. Joffe sworn to August 30, 1962, addressed to the three above motions of plaintiff and in support of his own motion,

upon the argument before the Court on the four above motions with defendant's counsel appearing in court and upon the

Defendant's:

Motion for reargument by letter dated the 19th day of September, 1962 in which he argued on the merits seven of the motions theretofore before the Court and reargument having been granted and motion denied and upon

Defendant's:

Submission of a proper order with notice of settlement wherein he submitted such order with direction directed toward the motion to remove monies from sequestered funds and further giving directions as to jurisdiction of subject matter and person and directing as to leave to put in his answering affidavits as to alimony and counsel fees motion giving dispositive orders to the receiver to pay monies to the infant issue of the parties herein, and

Upon the order of Mr. Justice Klein, dated December 12, 1962 wherein he stated as to the special appearance of the defendant on the said above mentioned motions:

"defendant, after vacating of his special appearance, having been granted leave within the ten day period aforesaid to serve his formal answering . . ." (ten days after service of copy of order)

and upon:

The Receiver's:

Order to show cause dated 1st and 8th days of October, 1962, signed by Mr. Justice Morris E. Spector to punish the defendant's trustee for contempt for

failure to turn funds over to the receiver together with annexed affidavit of the receiver, Frank Turnbull, sworn to September 29, 1962, affidavits of Murray H. Klinger, sworn to October 5, 1962 and October 16, 1962, and upon

Defendant's:

And upon the argument by defendant of the said motion before Mr. Justice Chimera upon the return day, October 23, 1962 and the adjourned return day October 30, 1962, and

Defendant's:

Order to show cause incorporating the contempt motion and requesting the Court to vacate the entire sequestration order or so much of it as would apply to that portion for which the trustee was being held in contempt, signed by Mr. Justice Morris E. Spector, dated the 19th day of October, 1962 together with annexed affidavit of Sidney H. Joffe sworn to the 19th day of October, 1962; of the Attorney for the Receiver, Murray H. Klinger, his associate, sworn to the 23rd day of October, 1962.

and upon oral argument by defendant's attorney of said motions before Mr. Justice Chimera on the adjourned return day, and upon the letter mailed by defendant's New Jersey attorney, showing a purported assignment of defendant and upon

Plaintiff's:

Order to show cause to stay the defendant from proceeding in New Jersey dated the 5th day of September, 1962, signed by Mr. Justice George Tilzer together with plaintiff's supporting affidavits dated the 31st day of August and the 22nd day of October, 1962 and the affidavits of Jesse Rothman, sworn to October 1, 1962, and upon

Defendant's:

Answering affidavits signed by Benjamin Lichtenstein, sworn to September 28, 1962 and J. Mortimer Rubenstein, New Jersey attorney for defendant, duly sworn to the 27th day of September, 1962 and filing with this Court a copy of the New Jersey Court order, and upon

The order of Mr. Justice Klein dated the 12th day of December, 1962 wherein he *struck the special appearance* of the defendant, and upon all the pleadings and proceedings theretofore had herein, all of the appearances of defendant's counsel labelled "special" or otherwise and all of the extensions of time, arguments and rearguments of motions heretofore had herein and all other papers, exhibits, supporting papers and the following court orders in addition to those hereinbefore enumerated,

Order of Mr. Justice Francis X. Conlon dated June 21, 1962

Order of Mr. Justice John L. Flynn, dated June 12, 1962

Opinion of Mr. Justice Thomas C. Chimera filed Nov. 9, 1962 and Order of said date

Order of Mr. Justice Thomas C. Chimera filed Nov. 9, 1962 (companion order to aforesaid order)

Order of Mr. Justice Klein dated September 25, 1962

Memorandum of Mr. Justice Klein filed September 25, 1962 (dated September 11, 1962)

Order of Mr. Justice Arthur G. Klein dated December 12, 1962 (pursuant to memorandum decision filed Dec. 4, 1962

Order of Mr. Justice Thomas C. Chimera dated Nov. 7, 1962

Order of Mr. Justice Thomas Aurelio dated Jan. 3, 1963.

And the Court having reviewed the entire file and papers therein and based upon the papers before it, the opinions of the various Justices, the filed orders and all the other pleadings and proceedings heretofore had herein. And this said motion having come on to be heard before me the 8th day of January, 1963 and the defendant having filed no papers in opposition fo this motion except a copy of an order dated Jan. 4, 1963 issued by the Superior Court of New Jersey, Chancery Division, Passaic County in a case entitled Sidney H. Joffe, plaintiff v. Gussie Joffe, defendant and a copy of a petition on which it was based issued Passaic County, and defendant having otherwise defaulted herein,

Now on motion of Jesse Rothman, attorney for the plaintiff, herein it is

Ordered and declared that the defendant by his participation in the case as set forth more fully herein has appeared generally herein, and it is further

Ordered and declared that the defendant has submitted himself generally to the jurisdiction of this Court conferring in personam jurisdiction over his person in the within action.

Enter

F. H. B.
J.S.C.

APPENDIX G

Findings of Fact and Conclusions of Law Supporting Separation Decree (New York Supreme Court—Justice Aurelio—December 2, 1963)

The above-entitled action having been brought on for hearing at Special Term, Part 12 of this Court, held in and for the County of New York at the County Courthouse in the City of New York on the 4th day of November, 1963, and on reading and filing the summons and verified complaint and the affidavit of service of William J. Tillie verified the 2nd day of July, 1962, from which it appears the summons and complaint were duly personally served outside the State upon the defendant above-named; and on reading and filing the order of Mr. Justice Arthur G. Klein dated the 12th day of December, 1962, which vacated the special appearance of the defendant after denying his motion to vacate service and gave him leave to file his answer to the complaint; and after reading and filing the order of Mr. Justice Frederick E. Backer dated the 11th day of January, 1963, which made a specific declaratory ruling that the defendant had appeared generally herein by his attorney Benjamin M. Lichtenstein, Esq., of 332 East 149th Street, Bronx, New York, after arguing the merits of the case on several motions and that this Court had in personam jurisdiction of the defendant, and it appearing that defendant has defaulted in the service of an answer herein and more than twenty (20) days have elapsed since the service of the summons and complaint herein and the date in which leave was granted to defendant by M. Justice Klein's order of December 12, 1963 to put in his answer and the time to answer having expired and not having been extended by further stipulation or order, and after hearing the allegations and proof of the plaintiff, I find and decide as follows:

Findings of Facts

1. That jurisdiction as provided for by Section 230 of the Domestic Relations Law has been obtained. That this Court has acquired in personam jurisdiction of the defendant by reason of his general appearance as set forth in the January 11th, 1964 order of Mr. Justice Frederick E. Backer incorporated into and made a part of this record together with all of the affidavits, exhibits and proceedings attached to same.

2. From the evidence educed, plaintiff and defendant were domiciled in the State of New York from the inception of the marriage throughout the entire marriage to the date hereof and the matrimonial res is and has at all times been and so remains in the State of New York. The infant issue of the parties has since birth been domiciled in the State of New York.

3. No answer has been served and the defendant has defaulted.

4. There is one infant issue of the marriage, namely Philip Lewis Joffe, born July 23, 1958.

5. That defendant inflicted cruel and inhuman treatment upon plaintiff.

6. That defendant abandoned plaintiff in the summer of 1961 when he refused to cohabit with her.

7. Defendant has totally failed and refused to support plaintiff and the infant since May 1, 1962.

8. That defendant is capable of paying $500 per week support to plaintiff and the infant.

9. That defendant is in arrears of $5,696 for alimony and support payments pendente lite and mortgage and tax

payments heretofore ordered paid together with attorneys fees in the amount of $2500.

10. That plaintiff paid for and is the owner of all furniture and furnishings listed on a certain schedule of "Exhibit 9" in evidence on the hearing of this case and is entitled to sole and separate use of said furniture, furnishings and personalty listed in said exhibit.

Conclusions of Law

1. Plaintiff is entitled to a judgment separating the plaintiff from the bed and board of the defendant forever because of defendant's cruel and inhuman treatment, abandonment and non-support of her and the infant issue of the marriage.

2. Plaintiff is entitled to custody of the infant issue of the parties with rights of visitation afforded the defendant every Sunday between 9:00 A.M. and 5:00 P.M., but at no time is he to remove the child from the jurisdiction of this Court.

3. Plaintiff is entitled to receive from the defendant the sum of $500 per week for support and maintenance of herself and support and maintenance and education of the infant issue of the parties ($300 of said sum being allocated to the wife and $200 of said sum being allocated to the infant).

4. That plaintiff is the sole owner of all furniture, furnishings and personalty purchased by her and that given to her as gifts by the defendant as listed and indicated on "Exhibit 9" in evidence on the hearing of November 4, 1963.

5. Plaintiff is entitled to judgment against the defendant in the sum of $5,696 for arrears of alimony and support

payments and the sum of $2500 attorney's fees previously awarded and unpaid.

6. Plaintiff is entitled to have the sequestration and receivership continued for the benefit of the plaintiff and infant issue of the marriage until further order of this Court.

7. The Court finds that both plaintiff and defendant were bona fide residents and domiciliaries of the State of New York from the date of the marriage, throughout the entire marriage to the date of entry of judgment herein; that the matrimonial res is and has been at all times since the marriage in the State of New York and continues so to be; that the infant issue has since birth and continues to be a domiciliary and native of the State of New York.

8. That the defendant has appeared generally in this action by his attorney, Benjamin M. Lichtenstein, Esq. and that this Court has in personam jurisdiction over his person.

LET Judgment be entered accordingly.

Dated: New York, December 2nd, 1963.

THOMAS A. AURELIO
Justice of the Supreme Court
of the State of New York.

Final Judgment of Separation (New York Supreme Court—Justice Aurelio—December 2, 1963)

The above-entitled action having been brought by plaintiff for a judgment of separation separating plaintiff from the bed and board of defendant forever on the ground of cruel and inhuman treatment, abandonment and non-support of the plaintiff, by the defendant, and the defendant having been duly personally served with the summons and verified complaint in this action outside the State of New York, and the defendant having appeared generally in this action by his attorney Benjamin M. Lichtenstein, Esq. of 332 East 149th Street, Bronx, New York, giving this Court in personam jurisdiction of his person, and it appearing that defendant was wilfully defaulted in the service of an answer herein, and that more than 20 days have elapsed since the time in which he was given leave to serve his answer, and his time to answer having expired and not having been further extended herein by stipulation or Court order, and this matter having been duly brought on for hearing at Special Term, Part XII of this Court before Honorable Thomas A. Aurelio, one of the Justices of this Court on the 4th day of November, 1963, and the plaintiff having appeared by Jesse Rothman, Esq. of 475 Fifth Avenue, New York City, her attorney, and presented her verified complaint, proof of service of the summons and complaint upon the defendant and an affidavit of regularity of this proceeding; and the allegations and proofs of the plaintiff having been heard, and plaintiff have moved to conform the pleadings to the proof and the said motion having been granted; and the Court having made and filed its decision in writing stating separately the facts found and the conclusions of law and having decided among other things that plaintiff is entitled to a judgment against the defendant separating her from the bed and board of the defendant forever;

NOW ON MOTION OF JESSE ROTHMAN, attorney for plaintiff it is

ORDERED, ADJUDGED AND DECREED that the plaintiff Gussie Joffe be and she hereby is separated forever from the bed and board of the defendant, Sidney H. Joffe as prayed for in the complaint herein because of the cruel and inhuman treatment, abondonment and non-support of plaintiff by defendant, and it is further

ORDERED, ADJUDGED AND DECREED that the defendant shall have the right to have visitation of Philip Lewis Joffe, the issue of the marriage every Sunday of each week commencing on the 22nd day of November, 1963, between the hours of 9:00 A.M. and 5:00 P.M.; but at no time is he to remove the said child from the jurisdiction of the said Court; and it is further

ORDERED, ADJUDGED AND DECREED that the plaintiff have the care and custody of Philip Lewis Joffe an infant, the issue of said marriage, and it is further

ORDERED, ADJUDGED AND DECREED and found by this Court that both plaintiff and defendant were domiciliaries of the State of New York continuously throughout the entire marriage to the date of the entry of judgment herein, that the matrimonial res has been at all times since the marriage in the State of New York and continues so to be and the infant has since birth been domiciled in the State of New York, and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff is to receive from the defendant the sum of $500 per week for support and maintenance of herself and support and maintenance and education of the infant issue of the parties ($300 of said sum being allocated to the plaintiff and $200 to the infant issue), and it is further

ORDERED, ADJUDGED AND DECREED that plaintiff is the sole owner of all furniture, furnishings and personalty listed as paid for by her or given as gifts to her as indicated in

the various schedules of "Exhibit 9" in evidence on the hearing of November 4, 1963, and it is further

ORDERED, ADJUDGED AND DECREED that the receivership be continued for the benefit of the plaintiff and issue of the marriage as set forth in Mr. Justice Conlon's order of this Court of June 21, 1962, until the further order of this Court, and it is further

ORDERED, ADJUDGED AND DECREED that judgment is hereby entered against defendant in favor of plaintiff for the sum of $5,696 representing arrears of alimony and support pendente lite and the sum of $2500 attorney's fees making a total sum of $8,196.00 awarded previously by the Court, and it is further

ORDERED, ADJUDGED AND DECREED that this decree may be enforced or modified only in the Supreme Court.

ENTER

T. A. A.
J.S.C.

JAMES McGURRIN
Clerk

FILED
Dec. 3, 1963
New York
County Clerk's Office

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1185

GUSSIE JOFFE,

Petitioner,

v.

SIDNEY H. JOFFE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

J. MORTIMER RUBENSTEIN,
Counsel for Respondent,
45 Church Street,
Paterson, New Jersey, 07505.

Adams Press Corp., 11 Commerce Street, Newark, N. J.—Market 3-8611-12

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1185

GUSSIE JOFFE,

Petitioner,

vs.

SIDNEY H. JOFFE,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

The respondent, Sidney H. Joffe, desires to file the following Brief in Oppositoin to the Petition for a Writ of *Certiorari* filed by the Petitioner in the above matter.

Counter-Statement of the Case

Prefatory Statement

The question involved in this matter is a simple question as to whether a Court has the right to punish for contempt a person, personally subject to its jurisdiction,

who has violated an Order of such Court. Because the Statement of the Case set forth in the Petitioner's Petition for a Writ of *Certiorari* contains many inaccuracies, rather than present a disjointed presentation of facts by pointing out the inaccuracies with the Court's indulgence we are presenting a statement of the facts that we maintain in accordance with the records in this cause as would be borne out by the records and transcripts of the cause of action.

Statement of Facts

Sidney H. Joffe was born in Paterson, New Jersey and has lived in New Jersey all of his 58 years of life. By profession he is a doctor and since the time he was licensed to practice medicine, he has practiced medicine in the State of New Jersey solely, basically in the City of Paterson, as a partner together with his twin brother, Philip Joffe, until the death of his brother, and thereafter still continues in such practice alone. On occasions he maintained an office in his home located in neighboring communities and always in the State of New Jersey and never practiced medicine in any other State. At no time in his life was he ever domiciled in or resided in any other State than the State of New Jersey.

The parties were married on January 15, 1955 at Glen Rock, New Jersey. At the time of said ceremony Sidney H. Joffe was residing at 155 Rock Road, Glen Rock, New Jeresy in a one-family home owned by him. At that time he maintained an offce for the practice of medicine at 556 East 28th Street, Paterson, New Jersey together with his twin brother, Philip Joffe. At that time he was on the staff of Barnert Memorial Hospital in Paterson, New Jersey and is still on said staff. At the time of the marriage the defendant was and still is an Attorney at

Law of the State of New York and a very shrewd and calculating woman, was domiciled in and resided in the State of New York and maintained an apartment in the State of New York.

After the marriage the Petitioner, Gussie Joffe, came to live with the Respondent, Sidney H. Joffe, at his home at 155 Rock Road, Glen Rock, New Jersey. Subsequently, three children of a previous marriage of the Respondent came to live with the parties at 155 Rock Road, Glen Rock, New Jersey. A child was born of this marriage, which child was born in the State of New Jersey and which child also came to live at 155 Rock Road, Glen Rock, New Jersey.

They continued to live at 155 Rock Road, Glen Rock, New Jersey until November 1959 at which time the parties purchased, as tenants by the entirety, a one family house in Montclair, New Jersey. The parties, together with the three children of the previous marriage and the one child of this marriage, lived at the Montclair, New Jersey residence. He continued his practice in Paterson, New Jersey, continued his association with the hospital in Paterson, New Jersey, continued his Temple Association in the State of New Jersey and at no time was he a member of any other religious Temple other than the one in New Jersey.

On May 1, 1962, the parties separated and the respondent moved to an apartment at Paterson, New Jersey. He requested that the petitioner and the infant child of this marriage to live with him but she refused to do so and remained with the infant child at the Montclair, New Jersey residence. Thereafter, the petitioner moved almost all of the furniture out of the Montclair, New Jersey home against the wishes of the respondent and without his knowledge and removed the child from

the home in Montclair, New Jersey to an apartment in New York City, New York.

On June 21, 1962, the petitioner, Gussie Joffe, instituted an action for separation in the Supreme Court of New York, Index No. 30789-62. In her Complaint she alleged that she was a resident of the State of New York. Simultaneously with the institution of her suit for separation, she filed Affidavits seeking a Writ of Sequestration. In her Affidavits she stated that she was seeking the Writ of Sequestration since the defendant, in the New York action, the respondent in this action, Sidney H. Joffe, could not be served with process in the State of New York and that no provision for judgment, either interlocutory or final, could be made for the support of the petitioner and child unless the Order of Sequestration was granted. This was based upon the fact that Sidney H. Joffe was not domiciled in the State of New York since had he been so domiciled the long arm statute of New York would have applied and based upon said Affidavit a Writ of Sequestration issued and certain assets of the respondent, Sidney H. Joffe, in the State of New York were seized.

On July 13, 1962, an Order to Show Cause was issued in said New York action requiring the respondent herein to show cause why an Order should not be made granting temporary custody of the infant child to the petitioner herein, granting alimony and support for said infant child, *pendente lite,* requiring him to maintain the home in Montclair, New Jersey, and other relief. On July 13, 1962, a copy of said Order to Show Cause, Affidavits and exhibits attached thereto, were served upon the respondent herein at his home, 759-11th Avenue, Paterson, New Jersey. He retained an attorney in the State of New York for the sole purpose of attacking the juris-

diction of the action instituted in the New York court by way of special appearance in accordance with the rules of New York and not to enter a general appearance. The said attorney, in accordance with the rules of New York courts then in effect, filed a Notice of Motion by way of special appearance attacking the jurisdiction of the New York court, on the grounds that Gussie Joffe, the plaintiff in such action, was not a resident of the State of New York. Such Notice of Motion was filed on August 14, 1962.

On August 16, 1962, the respondent herein, Sidney H. Joffe, filed a Complaint in the Superior Court of New Jersey, Chancery Division, seeking in the First Count custody of the infant child and seeking in the Second Count an accounting for furniture removed by the petitioner in this cause. The Summons and Complaint were served upon the said Gussie Joffe personally in the State of New Jersey by the Sheriff of the County of Passaic and State of New Jersey in accordance with the rules of the New Jersey courts. On August 27, 1962, Sidney H. Joffe filed a verified Petition in said New Jersey action seeking an Order of injunction against the said Gussie Joffe. Based upon said Petition, an Order to Show Cause with restraints issued on August 27, 1962. A day or two before the time for answer to expire, at the request of the attorney for Gussie Joffe, attorney for Sidney H. Joffe in the New Jersey action signed a Stipulation extending time to file an Answer.

In the meantime, on September 12, 1962, Judge Klein of the New York Supreme Court rendered an opinion on the Notice of Motion to strike the Complaint brought by Sidney H. Joffe in the New York action by way of special appearance. His decision held that Gussie Joffe's Affidavit established a *prima facie* residence on her

behalf in the State of New York and that such *prima facie* proof coupled with a levy made on the defendant's assets in the State of New York were sufficient to give the New York court jurisdiction for the purpose of denying the motion. No finding was made by Judge Klein either that Sidney H. Joffe was domiciled in the State of New Jersey or that he was personally subject to the jurisdiction of that court. The decision gave Sidney H. Joffe the right to file an Answer to the Order to Show Cause and the Complaint. Sidney H. Joffe neither filed any such Answer nor Affidavits and did not thereafter, in any way, participate in the proceedings.

On September 20, 1962, Gussie Joffe, defendant in the New Jersey action, filed with the New Jersey Superior Court, in the case then pending, a verified Petition to strike the Complaint of Sidney H. Joffe in such New Jersey action on the grounds that the New Jersey court did not have jurisdiction. Based upon said Petition, an Order to Show Cause issued September 20, 1962 and returnable October 5, 1962 which Order to Show Cause restrained Sidney H. Joffe from proceeding with his cause of action and from proceeding upon the Order to Show Cause issued by the court dated August 27, 1962, and until the further order of the court. On September 21, 1962, the Honorable Vito A. Concilio, Judge of the Superior Court, entered an Order in said New Jersey action restraining Gussie Joffe from proceeding in any manner with her cause of action instituted by her in the State of New York, until the further order of the court and determination of the motions. A copy of said Order for temporary restraint was served upon Gussie Joffe personally. The said Gussie Joffe never moved to vacate said restraints. Nor did she appeal from said restraints. Said Order of Restraint has never been vacated by the Court and still remains in full force and effect.

Sidney H. Joffe filed an Answering Affidavit on October 3, 1962 in answer to the verified Petition of Gussie Joffe to strike the New Jersey Complaint. Said motion to dismiss filed by the said Gussie Joffe in the New Jersey court was argued and the court ordered the matter continued until November 2, 1962. An Order of Continuance to that effect was entered by the court which continued the restraints contained in the Order to Show Cause of September 20, 1962 obtained by Gussie Joffe and the Order of Restraint contained in the court's Order of September 21, 1962 obtained by Sidney H. Joffe and provided that Sidney H. Joffe be given leave to file an Amendment to the Complaint adding a Third Count seeking to permanently enjoin the said Gussie Joffe from proceeding in the State of New York.

Thereafter, the said return day of Orders to Show Cause and Notice of Motion were adjourned at the request of the said Gussie Joffe and the matter was set down for the taking of oral testimony upon the motion filed by the said Gussie Joffe on January 16, 1963. All restraints were continued and an Order permitting the said Sidney H. Joffe to have visitation with the infant child who is in the physical possession of Gussie Joffe, was entered.

On or about December 24, 1962, Gussie Joffe, in violation of the restraints imposed upon her in the New Jersey action, filed a Notice of Motion in the New York action seeking to have a declaration made that Sidney H. Joffe had appeared generally in said New York action. The Notice of Motion was returnable January 8, 1963. Sidney H. Joffe filed a verified Petition in the New Jersey action seeking to hold the said Gussie Joffe in contempt based upon the above facts, on January 4, 1963, An Order to Show cause issued on said verified

Petition and contained restraints restraining her from proceeding in the New York action and requiring her to vacate any Orders which she might obtain. No application was made to dissolve the restraints despite permission contained in the Order to Show Cause to do so and despite the restraints issued, Gussie Joffe proceeded to have an Order entered in the New York court declaring that Sidney H. Joffe had appeared generally in the New York action. The said Sidney H. Joffe made no appearance, either personally or through attorney on said motion in the New York court nor did he participate therein in any manner.

The said Gussie Joffe then filed a Suplementary Affidavit to her Petition to dismiss the Complaint in the New Jersey court and alleged as additional grounds the Order of Judge Backer in the New York court entered on January 11, 1963 declaring that Sidney H. Joffe had entered a general appearance in New York as an additional reason why the courts of New Jersey did not have jurisdiction. The matter of taking of testimony on the Petition to strike the New Jersey Complaint was partially heard and continued to an additional date. The said Gussie Joffe, through her attorneys in the New Jersey action, delayed the taking of such additional testimony by repeated requests for adjournments. In the meantime she continued to move her cause of action in the State of New York despite the restraints imposed upon her by the courts of New Jersey in the suit in which she had been served personally. Each time she served a paper on Sidney H. Joffe of her planned move in New York, applications were made in the New Jersey Superior Court to restrain her and hold her in contempt for violating the Orders of the New Jersey Superior Court. Each time the restraints were granted and the applications to hold her in contempt were carried until

disposition of her Petition to strike Sidney H. Joffe's Complaint in the New Jersey Superior Court. Included among such actions taken by her, was to obtain judgment for arrearages on the *pendente lite* order of the New York Supreme Court.

The continued date of taking of testimony in the New Jersey Superior Court on Gussie Joffe's Amended Petition to strike the Complaint filed by Sidney H. Joffe in such court was held on November 15, 1963. The said Gussie Joffe was represented by counsel at such hearings and participated fully in said hearings. Testimony not being completed on that date, the matter was continued to December 19, 1963 to take further testimony.

During that interval, Gussie Joffe again proceeded with her New York action contrary to the restraints. She caused to be served a Notion for settlement of proposed findings of fact, conclusions of law and judgment of separation. Once again Sidney H. Joffe filed a Petition in the New Jersey Superior Court seeking to restrain her from proceeding in the New York court and to hold her in contempt. An Order to Show Cause issued on his application which contained restraints restraining her from proceeding. Despite the restraints imposed upon her, Gussie Joffe proceeded and obtained a judgment for separation in the Supreme Court of the State of New York on December 2, 1963. Sidney H. Joffe did not participate in any manner, either personally or through counsel, in such New York proceedings.

In the interim and in the meantime for almost one year the said Gussie Joffe refused to abide by the Order of the Court permitting Sidney H. Joffe to have visitation with the infant child of the marriage and in violation of the Order of the Court. Sidney H. Joffe, on November 21, 1963, filed a Petition setting forth said facts

and sought to hold the defendant in contempt of Court for refusal to grant the plaintiff visitation in accordance with the *pendente lite* Order entered by the Court. Based upon said Petition an Order to Show Cause issued on November 21, 1963 directing the said Gussie Joffe to show cause why the relief prayed for in said Petition should not be granted. On the return day of the Order to Show Cause, this Petition for Contempt was likewise carried until the completion of the hearing on the application filed by way of Petition and Amended Petition by Gussie Joffe to strike Sidney H. Joffe's Complaint.

Immediately upon obtaining the judgment for separation in the New York Supreme Court, Gussie Joffe moved in the New Jersey Superior Court to declare that the Judgment for separation obtained in the New York Supreme Court was entitled to full faith and credit in New Jersey as a valid *in personam* judgment against Sidney H. Joffe and amended her Petition to strike the plaintiff's Complaint based upon said additional grounds.

On December 19, 1963 the testimony on her Petition to strike the New Jersey Complaint, including her allegations concerning the Order of Judge Backer declaring that Sidney H. Joffe had entered a general appearance in the State of New York and her allegation that the Judgment of separation obtained in the State of New York was entitled to full faith and credit in New Jersey as a valid *in personam* judgment against Sidney H. Joffe. Gussie Joffe appeared through counsel and participated fully in said hearing. At the conclusion of the testimony, the trial judge requested Gussie Joffe to submit an exemplified copy of the New York Supreme Court proceeding. Her counsel said that she would do so immediately and the trial judge reserved decision pending the submission of such record.

On August 24, 1964 the Hon. Vito A. Concilio of the New Jersey Superior Court rendered his decision upon the Amended Petition filed by Gussie Joffe to strike the Complaint filed by Sidney H. Joffe. He found from the evidence adduced and produced that Sidney H. Joffe was and had been domiciled in the State of New Jersey, that the infant child was and had been domiciled in the State of New Jersey all of his life until removed to the State of New York by Gussie Joffe without the permission of Sidney H. Joffe, that as a matter of fact Sidney H. Joffe had not entered a general appearance in the State of New York and had not litigated the issues in the State of New York; and that the various Orders and Judgments of the New York Supreme Court that Sidney H. Joffe was domiciled therein or had entered a general appearance were not entitled to full faith and credit in New Jersey nor was the Judgment of Separation obtained by Gussie Joffe entitled to full faith and credit in New Jersey as *in personam* judgment against Sidney H. Joffe. An Order to such effect was entered on September 8, 1964. Said Order remains in full force and effect today. Said Order of September 8, 1964 above referred to in the New Jersey Superior Court referred all outstanding contempt applications and Motions to the Hon. David A. Nimmo, Judge of the Superior Court of New Jersey, for appropriate action. One additional application for contempt was referred to the Hon. Vincent C. Duffy sitting in the New Jersey Superior Court for action.

A hearing was held on the contempt application before the Hon. Vincent C. Duffy in which Gussie Joffe participated through counsel. An Order of Contempt was entered by the Hon. Vincent C. Duffy in the New Jersey Superior Court on October 20, 1964. Said Order of Contempt punished the said Gussie Joffe and contained,

among other things, an Order requiring Gussie Joffe to vacate the Orders and the Judgments obtained by her in the New York action.

A hearing was held on the contempt applications referred to the Hon. David A. Nimmo in the New Jersey Superior Court in which Gussie Joffe participated through counsel. An Order of Contempt was entered by the Hon. David A. Nimmo on November 12, 1964. Said Order of Contempt required, among other things, that Gussie Joffe vacate the Orders and Judgments obtained by her in the New York action.

Gussie Joffe appealed from said Orders of Contempt to the New Jersey Superior Court, Appellate Division, which affirmed the Orders. She then Petitioned the Supreme Court of the State of New Jersey for Certification and Certification was granted. Thereafter the matter was appealed to the Supreme Court of the State of New Jersey and was affirmed by the Supreme Court of the State of New Jersey.

After the entry of the Order by the Hon. Vito A. Concilio on September 9, 1964, Gussie Joffe filed her Answer in the New Jersey action. Hearings, after numerous delays because of requests for adjournment and change of counsel by Gussie Joffe, were held over approximately 12 days and the parties are awaiting decision in said matter.

Reasons Why the Writ Should Not Be Granted

The only question involved in the decisions of the trial tribunal of the New Jersey Superior Court as affirmed by the Supreme Court of the State of New Jersey are the questions of whether the defendant was properly held in contempt of court. The questions of contempt of

Court and the power of a State Court to impose punishment for contempt of its Orders by a person who was subject personally to the jurisdiction of the Court is primarily and basically a State law question and involves no Federal matter or Constitutional question.

The power to punish for contempt of Court is regarded as an essential element of judicial authority. It is possessed as a part of the judicial authority granted to the Courts created by the Constitution of the United States and by the Constitution of the several States. It is a power which is said to be inherent in all Courts of general jurisdiction whether they are State or Federal, *United States* v. *Shepp,* 203 U. S. 563; *Re Savin,* 131 U. S. 267; 17 Am. Jur. 2d 62; *Lawrence* v. *Lawrence,* 79 N. J. Sup. 25 (App. Div. Sup. Ct., 1963)

The only cases in which Injunctive Order was held not to be effective were cases in where there was no personal jurisdiction over the party enjoined In our case there was personal jurisdiction over the Petitioner, Gussie Joffe. This personal jurisdiction was in addition to the jurisdiction which the Superior Court of New Jersey had over the subject matter of the plaintiff's suit, to wit: the custody of the infant child based upon the fact that the infant child was a native born child of the State of New Jersey and the domicile of the father was in the State of New Jersey. R.S. of New Jersey 9:2-3 and 9:2-2; *Edwards* v. *Edwards,* 8 N. J. Super. 547 (Ch. Div., Super. Ct. 1950); *Fantony* v. *Fantony,* 31 N. J. Super. 14 (App. Div., Super. Ct. 1954); *Casteel* v. *Casteel,* 45 N. J. Super. 338 (App. Div., Super. Ct. 1958); *Restatement, Conflict of Law,* Sec. 145, Sec. 117.

The New Jersey Court, like all other courts, has the right to take such measures as are necessary and appropriate to enforce compliance with its orders. *Lathrop*

v. *Lathrop,* 50 N. J. Super. 525 (App. Div., Super. Ct. 1958); 57 N. J. Super. 532 (App. Div., Sup. Ct. 1959); *Swanson* v. *Swanson,* 10 N. J. Super. 513 (App. Div. 1950).

The only question involved in this matter was the enforcement by a State Court of an injunctive Order directed to a litigant over whom the court had personal jurisdiction by virtue of personal service upon the litigant. Certainly no federal question is involved. It is basic law that if a person to whom an injunction is directed wishes to test its validity before complying with it, the Appellate Court is open to such person otherwise he must obey it. As a general rule, a party cannot on an appeal from a conviction of contempt assert that the court order which he contemned was based upon error of law or fact but rather that the Contemnor's recourse is to take a direct appeal from the court order. *Lawrence* v. *Lawrence,* 79 N. J. Super. 24 (App. Div., Sup. Ct. 1963); *In re Tiene,* 17 N. J. 170 (Supreme Ct. 1954). In this case, the petitioner took no action against the Order of injunction although such appeal and avenues of recourse were available to her. Her conviction of contempt was in conformance with the laws of the State of New Jersey and the laws of all courts, including the Federal courts.

CONCLUSION

For the reasons above expressed, the application for the Writ of Certiorari to review the judgment below should be denied.

Respectfully submited,

J. MORTIMER RUBENSTEIN,
Counsel for Respondent.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

Nos. 1185 and 1186

GUSSIE JOFFE,

Petitioner,

v.

SIDNEY H. JOFFE,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY AND TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY MEMORANDUM

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IN THE

SUPREME COURT OF THE UNITED STATES

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GUSSIE JOFFE,

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY AND TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY MEMORANDUM

Pursuant to Rule 24(4), which provides that reply briefs "addressed to arguments first raised in the briefs in opposition may be filed," petitioner files this reply memorandum addressed to certain arguments first raised in the respondent's two briefs in opposition.

No. 1185

In the New Jersey contempt case, No. 1185, the respondent's brief contends (at page 14) that the petitioner is barred from contesting the validity of the New Jersey restraining orders at this contempt juncture since she took no action to contest or appeal from the original restraining orders. Such an argument must fail for two reasons:

(1) As indicated in the chronology of the New Jersey proceedings set forth in the Petition in No. 1185, the petitioner wife repeatedly protested that the New Jersey restraints violated the Full Faith and Credit Clause of the United States Constitution.[1] But none of those protests resulted in any ruling on the validity of the restraints, in a form that could be considered final and appealable, until Judge Concilio's opinion and order of August 24, 1964. See Petition, Appendix B. There, for the first time, petitioner's objections to the restraints were overruled and the Full Faith and Credit Clause was held not to bar the issuance of the New Jersey restraints.

But even that ruling lacked finality in that the then pending orders to show cause why petitioner should not be held in contempt were referred to other judges for determination. See Pet. App., p. B-24. Not until the contempt orders were entered (Pet. App. pp. C-1 to C-5) did the necessary appealable finality appear. And by that time, the final contempt orders plainly encompassed and incorporated the ruling as to the impact of the Full Faith and Credit Clause rendered by Judge Concilio. Hence the petitioner took every conceivable step to protest the original New Jersey restraints[2] and promptly appealed from the ruling as to their validity as soon as a final and appealable order was entered.

---

[1] See items numbered (3), (4), (8), (9), and (11) in the New Jersey Superior Court chronology of events. Petition, pp. 11-17.

[2] The respondent persistently submitted the New Jersey restraints to the New York courts, which consistently ignored them as of no legal effect. Petitioner understandably relied upon this attitude of the New York courts to support her position that the New Jersey restraints were invalid under the Full Faith and Credit Clause.

(2) Equally significant is the fact that neither the Supreme Court of New Jersey nor the Appellate Division of the Superior Court declined to pass upon the federal full faith and credit issues because of any asserted failure to appeal from the earlier restraints.[3] Recognizing that the contempt orders were enmeshed with the ruling as to the validity of the restraints, those courts affirmed not only the contempt findings but also ruled that there was "nothing in the record to establish that at the time the Chancery Division action was commenced the New York court had personal jurisdiction over the plaintiff or the marital *res*." Pet. App., p. A-2. In other words, the Full Faith and Credit Clause was held not to bar the New Jersey restraints in this case.

Thus it is in the context of a fully developed and litigated dispute under the Full Faith and Credit Clause that the New Jersey case reaches this Court. Nothing that respondent has said in his opposition brief detracts from the reasons why certiorari should be granted.

No. 1186

The respondent's brief in opposition totally ignores the basic question presented by the Third Circuit's opinion—whether a federal court in an *Erie* situation is independently obligated to determine the degree of faith and credit it will give to a foreign judgment, or whether it must rely upon the faith and credit given by the court of the state in which the federal court sits. The reasons for the grant of certiorari to determine that recurring issue are unaffected by respondent's opposition.

---

[3]The respondent did indeed argue the point on the appeal but his contention was pointedly ignored by both appellate courts. And in any event, New Jersey recognizes that injunctive restraints may always be attacked, subsequent to their issuance, on jurisdictional grounds. See *Lawrence v. Lawrence*, 79 N.J. Super. 25 (App. Div.), affirmed, 36 N.J. 549. If the prior New York judgments were entitled to full faith and credit, the New Jersey restraining orders had no jurisdictional basis.

But respondent's brief (page 15) does suggest as a reason for denying certiorari that the federal courts here acted to prevent a multiplicity of suits and a duplication of judicial time. But nothing that the Third Circuit or the District Court did or said justifies any such argument. Moreover, even if the obligation to give full faith and credit to foreign judgments produces different results in different jurisdictions, the resulting multiplicity is not one outlawed by the demands of full faith and credit. Any inconsistencies in results must then be cured through the appellate processes, including those of this Court.

CONCLUSION

For these reasons, supplementing those in the Petitions, the writs of certiorari should issue as requested.

Respectfully submitted,

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April 23, 1968

SUPREME COURT, U. S.

MAY 23 1968

JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 1185

GUSSIE JOFFE,

Petitioner,

v.

SIDNEY H. JOFFE,

Respondent.

PETITION FOR A REHEARING

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May 20, 1968.

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In the

SUPREME COURT OF THE UNITED STATES

Term, 1968

No. 1185

GUSSIE JOFFE,

Petitioner,

v.

SIDNEY H. JOFFE,

Respondent.

PETITION FOR REARGUMENT OF A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

TO THE HONORABLE, CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner GUSSIE JOFFE, defendant-appellant in this case respectfully shows:

The Petitioner Gussie Joffe, respectfully prays that she be permitted to reargue the petition for writ of certiorari heretofore filed herein under Docket #1185.

The grounds for the rehearing are substantial and "available to petitioner although not previously presented" in accordance with Rule 58 subdivision 2 of the Rules of the Supreme Court of the United States.

Substantial grounds are presented in that the statute under which the Court based its jurisdiction to entertain the custody action in which the restraint and subsequent contempt judgments were entered being Statute NJSA 9:2-2 is unconstitutional in that it draws in issue and violates Article IV and the 8th and 14th Amendment of the United States Constitution both standing alone and as utilized in the case at bar to deprive petitioner and the infant issue of the parties of equal rights and privileges, equal opportunities and protection, property and liberty without due process of law and their right to have full faith and credit

given to a New York judgment. The argument is available to petitioner in that the question was raised as set forth hereinafter, page 93 The question of its conflict with Article IV and the 8th Amendment was raised in the lower Courts - Superior Court and Appellate Divisions and the 8th and 14th Amendment violation was raised in reargument in the Supreme Court of New Jersey. Notice of appeal was heretofore filed November 5, 1967 by petitioner from the decision of the Supreme Court of New Jersey in which the petitioner specifically quoted said statute, being NJSA 9:2-2 of the State of New Jersey which states:

> "When the Superior Court has jurisdiction over the custody and maintenance of the minor children of parents divorced, separated or living separate, and such children are natives of this State, or have resided five years within its limits, they shall not be removed out of its jurisdiction against their own consent, if of suitable age to signify the same, nor while under that age without the consent of both parents, unless the court, upon cause shown, shall otherwise order..."

as unconstitutional as utilized in the case at

bar in that it draws in issue, violates and is repugnant to Article 4 and the Eighth and Fourteenth Amendments of the United States Constitution, abrogates the rights guaranteed therein and conflicts therewith.

The Statutory provision believed to confer on this Court jurisdiction of this appeal is USC 28:1257.

Inasmuch as the cases hold that a writ of Certiorari may in a proper case be treated as a jurisdictional statement, in reargument petitioner respectfully requests permission to argue the constitutionality of the State statute under which the right to entertain the suits resulting in the judgment appealed, arose. Since petitioner filed a timely notice of appeal specifically citing the statute as unconstitutional and since the constitutionality was in issue in the Courts below this Court has jurisdiction to entertain the subject. Petitioner hereby covers the same legal material as would be in a jurisdictional statement on reargument of writ.

THE JUDGMENT FROM WHICH THE APPEAL IS TAKEN AND OPINION BELOW

The judgment was entered October 9, 1967 by the Supreme Court of the State of New Jersey.

The judgment from which the appeal is taken is the percuriam decision of the Supreme Court of New Jersey. A timely petition for rehearing was denied by that court on October 31, 1967. On January 16, 1968 Mr. Justice Brennan signed an order extending the time for filing this petition for certiorari to and including March 1, 1968. Petition for writ of certiorari was filed March 30 and denied April 30. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3). The opinion delivered by the Supreme Court dated October 9 is reported at 50 NJ 265 and 234 A 2d 232 at 233. The text of said opinion is set forth in Appendix A of the original writ hereto, p. A-1 infra. Said opinion affirmed the opinion of the Appellate Division of the Superior Court of New Jersey dated October 24,

1965, which Appellate Division decision also appeared at 50 N.J. 265 and 234A, 2d 232 and is contained in the said Appendix A hereto. The Appellate Division opinion affirmed two judgments of contempt as follows:

> "The unreported contempt order of October 20, 1964, signed by Judge Duffy of the Superior Court of New Jersey, together with the unreported contempt order of November 12, 1964 signed by Judge Nimmo of that court, are also reprinted in Appendix C hereto, p. C-1 infra."

Said contempt orders were entered without full hearing based upon the jurisdictional opinion dated August 24, 1964 of New Jersey Superior Court Judge Vito A. Concilio, in which the latter held that NJSA 9:2-2 gave him jurisdiction to entertain a custody action wherein restraints were entered, dated the 24th day of August, 1962 which is unreported; and is reprinted in Appendix B hereto, p. B-1 infra of the original writ.

In this opinion the court relitigated

jurisdiction and domicile of the parties and held that the New York final contested judgment of separation between the parties, which litigated the domicile of the parties and found domicile in New York, was not entitled to full faith and credit, and that NJSA 9:2-2 conferred jurisdiction upon the Superior Court to relitigate jurisdiction and entertain restraints restraining the appellant from enforcing her New York judgments and orders and found it had jurisdiction to entertain contempt proceedings therefor and which referred the motions pending two years to find petitioner in contempt to judges Vincent C. Duffy and David Nimmo of the Superior Court of New Jersey supra. The unreported contempt order of Hon. Vincent C. Duffy dated October 20, 1964 found the appellant in contempt of the New Jersey Courts for proceeding to judgment and enforcement of New York Judgment of Separation dated December 3, 1963, and ordered her to vacate her New York judgments or go to jail.

Said opinion and order based thereon (as punishment for contempt of visitation order) changed custody of the child.

The unreported opinion of Superior Court Judge David S. Nimmo dated November 12, 1964 found appellant in contempt in New Jersey for refusal to grant weekend visitation of the infant to appellee in accordance with a New Jersey Court order although the New York final Judgment of separation held that the child could not be removed from the State of New York.

Notice of appeal was filed November 5, 1967 from the decision of the Supreme Court of New Jersey. (AP. I)

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED

The writ heretofore filed stressed the failure of the Court below to observe petitioner's Constitutional right to have a judgment of another state given full faith and credit. It did not adequately cover the question posed by the Notice of Appeal filed. The Appendix inadvertantly omitted several pages of Judge Concilio's New Jersey Superior Court opinion, (which decided and denied appellant's motion to dismiss on constitutional grounds, the custody action brought under 9:2-2 from which the judgments appealed arose). Specifically ruling under the Statute, Judge Concilio directly and unequivocally stated; (Appendix H annexed)

> "The question to determine is whether this Court has jurisdiction to decide the issue of custody.
>
> "'The statutory expression of New Jersey's policy concerning the removal of minor children of divorced or separated parents from this state dates from L. 1902, c. 92, and is now found in the following provisions of the Revised Statutes, as amended:

"NJSA 9:2-2: "When the Superior Court has jurisdiction over the custody and maintenance of the minor children of parents divorced, separated or living separate, and such children are natives of this State, or have resided five years within its limits, they shall not be removed out of its jurisdiction against their own consent, if of suitable age to signify the same, nor while under that age without the Consent of both parents, unless the Court, upon cause shown shall otherwise order..."

This Court concludes on this issue that this Court has jurisdiction to hear this matter."

"The next inquiry is whether this court can assert jurisdiction in this matter as a court in New York has before it an action commenced prior to this action wherein the parties therein are reversed and which action also has for its determination the question of custody.

It is important therefore to examine the proceedings in the New York Court from its inception to the time the petition by the defendant was filed in this Court on September 19, 1962.

The plaintiff herein..appeared specially before the New York Court for an order vacating and setting aside the summons and complaint..on the ground that the court does not have jurisdiction of the subject matter and..defendant is a person not subject to the jurisdiction of.. (that).. Court.

Justice Klein rendered a decision on

September 11, 1962 which is D-4 in evidence. It is repeated here..

"The finding by Justice Klein that he had jurisdiction in the matter..does not foreclose this court in its relation to our social institutions in accordance with the public policy of this state..It is apparent from Justice Klein's decision that plaintiff herein has appeared specially in New York. His decision tells this court that the plaintiff therein, by the voluminous affidavits filed by both parties, relative to residence, satisfied that court as to the jurisdictional requirements with respect to New York residence. This Court therefore finds that the plaintiff herein did enter a special appearance to contest the jurisdiction of the New York Court..

The defendant therein next appears before Justice Frederick Backer, for him to make a determination whether plaintiff herein had entered a general appearance in the New York matter. This court finds that there is nothing in said file, nor that plaintiff herein either himself or by his New York attorney, which would indicate that he entered a general appearance by participating in the case actively and arguing it on the merit. This Court also finds that the findings of Justice Backer is not res judicata and that this Court is not bound thereby as it is not such a finding that this Court has to give full faith and credit to under the United States Constitution.

This Court finds that the New York Supreme Court did not have jurisdiction of both parties. This motion to dismiss the complaint is accordingly denied and the restraint of the plaintiff entered herein

is vacated."

Thus not only was the unconstitutional statute stated as the basis of jurisdiction in the New Jersey complaint and was envisoned instinct and an integral part of the Superior Court opinion without which no decisions could have been reached but it was the whole, total and sole basis of and source of jurisdiction for the judgments sought to be reversed. The total impact of this statute (which directly violated both the child's and petitioner's constitutional rights hereinabove enumerated) on the life and destiny of any child born within the state boundaries of New Jersey or even delivered in a New Jersey hospital as the child at bar, is dramatically illustrated by the six year litigation (depriving the child of constitutional rights), jurisdiction to entertain which was admittedly based wholely and solely on this unconstitional statute.

The petitioner prays that this court issue an order permitting the review of the judg-

ment of the Supreme Court of New Jersey entered in this proceeding on October 9, 1967 which directly upheld the constitutionality of said statute relied upon by the Superior Court of New Jersey to give it jurisdiction to entertain restraints and contempts thereunder which were affirmed by the Supreme Court of New Jersey in a custody action of an absent child and nonedomiciled child; the right to refuse full faith and credit to decrees of other states, the right to relitigate multitudinous suits and issues already litigated, the right to flout restraints of other states with impunity while entertaining restraints of its own and deprive the infant of due process, equal rights and privileges (14th Amendment) and full faith and credit (Article 4), and imposed cruel and inhuman punishment and excessive fines on petitioner (8th Amendment) and deprivies her of her liberty without due process of law (14th Amendment)

JURISDICTION

This is a custody action involving the right of one state to control the movement of infants out of its borders their entire minority and completely control their custody, fortunes, freedom inheritance rights until they become twenty-one years, regardless of their presence, domicile in any other state and adjudicated rights there. It also clearly illustrates how the statute in question not only completely constitutes the State of New Jersey the keeper of all of the Constitutional rights of a child born in New Jersey or residing there five years, but also violates the adjudicated and constitutional rights of its parents though they be residing elsewhere and domiciled elsewhere and possess adjudicated rights and judgments in other States of the Union. It illustrates the manner in which New Jersey Courts have used the said statute to become the appellate Court and the court of last resort in the ultimate enforcement of any judgment pro-

cured anywhere else in the United States - so long as some child of the parties was born or at least lived five years anytime in its lifetime in the State of New Jersey.

Said statute claims permanent New Jersey state nativity and domicile for any child born in New Jersey or residing there only five years and such child can never rid itself of that domicile or acquire the domicile of the person having care and custody and supporting and protecting such child in another state as against such dangers and cruelties and vicissitudes it can meet at the hands of a cruel derelict parent residing in the State of New Jersey. As utilized in the case at bar - regardless of how far such child may have been taken to rid itself of a preying, destructive evil parent and regardless of how strong, protective and meaning and constructive the parental hand in another state may be for said child, said child is bound forever to the parent remaining in New Jersey and the courts there have jurisdiction

over its person regardless of its absence for many years and lack of support or care from such parent in New Jersey. That likewise the state of New Jersey or derelict parent residing therein can control or deprive said child of the adjudicated fortunes of such children though they and their fortun es be absent, and in another state.

As utilized in the case at bar said statute was used to deprive the Joffe child of its parental rights adjudicated in another state where it was being supported and resided and protected and said State of New Jersey used said statute to strip said child of its assets, adjudicated right to $200. weekly, a decent education, direly needed medical and rehabilitative care from an affluent father then in the jurisdiction of the adjudicating state.

NJSA 9:2-2 which says:

> "When the Superior Court has jurisdiction over the custody and maintenance of minor children of parents divorced or separated or living separate, and such children are natives of this state or resided five years within its limits, they shall not be removed out of its jurisdiction."

is patently unconstitutional and repugnant to the United States Constitution as used in the case at bar enabling a New Jersey Court to directly decide cases in direct conflict with the ruling Supreme Court decisions, in that New Jersey permitted an absconding New York father to successfully utilize said statute to confer jurisdiction on its Superior Court to entertain a custody action of an absent, abandoned, intellectually gifted, half-blind New York child whose custody and right to $200. weekly support from the affluent father was awarded to themother ina litigated New York separation action wherein the father challenged jurisdiction, effected a general appearance and which New York final judgment of

separation adjudicated the domicile of the parties to be in New York and was entitled to full faith and credit in New Jersey.

In said custody action of said absent child, New Jersey presumed to sit as an Appellate Division over the Judges sitting on the same level in New York rendering the decisions in New York, and denying full faith and credit to a New York decree (Article IV), relitigated all of the jurisdictional and matrimonial issues litigated in New York two and one-half years earlier; arriving at different decisions and finding domicile in New Jersey. And said custody trial has been on trial for six years in New Jersey, being tried a few days each year, in which litigation the child has been successfully restrained from collecting any support whatsoever or medical costs and rehabilitation expense (for the child) from the husband and the mother has been found in contempt for enforcing her New York judgments (deprivation of property without due process, Amendment 14)

and ordered to vacate her valid 5 year old New York judgment or go to jail.(deprivation of liberty without due process). This, in spite of the fact that during the six year pendency of the custody action, while the child grows to manhood, the absconding father has failed to support the handicapped child although he had limitless visitation which he refused to exercise and the wife was forced to transport the child back and forth to New Jersey to avoid being in contempt on visitation. Said custody action is in its sixth year, has been utilized as a "holding operation" while the appellee has conveyed away his assets, based on a fraudulent divorce predicated upon the relitigated false domicile; (N.J.

This case some to this court on appeal of two final orders of contempt entered against the wife, one ordering her to vacate her New York decree or go to jail - the other fining her $3200. for failure to give the husband weekend visitation in accordance with a New

Jersey order, whereas the New York order gave Sunday visitation and forbade removal of the child from the State of New York. Obedience to one Court puts appellate in contempt of the other Court. Her child's domicile is in New York, she owns valuable property in New Jersey. Due to entry of the contemptorders and warrant of arrest the wife was unable to enter New Jersey to defend the custody and (replevin and injunction action appended thereto) and a divorce based on fraudulent relitigated domicile and so child and wife were deprived of their civil rights and procedural due process and property without due process of law. The restraints for violation of which the wife was found in contempt were illegally entered in the New Jersey custody action since at the time of their issuance by the New Jersey Court the wife had restraining orders against the husband both in the New York and New Jersey actions, restraining him from proceeding in New Jersey. In violation of the wife's two restraining orders in two states, one of which required two days no-

tice to vacate, the husband's attorney appeared in the New Jersey custody action on a "stayed" motion and upon a private conversation with the Court, without knowledge or notice to the wife's counsel, without so much as a telephone call to opposing counsel entered the restraints in which the contempt orders were eventually entered. This affornt to due process was attempted to be explained when the restraints were introduced in New York by respondent in one of his general appearances, and their legality litigated there. New York refused them efficacy. New Jersey 2½ years later then relitigated the New Jersey restraints, ignored the New York restraint against the husband-respondent and the New Jersey restraint against husband-respondent, found the appellant in contempt of the husband's New Jersey restraint and ordered the wife to vacate her valid New York orders and judgments or go to jail. (Depriviation of liberty without due process Amendment 14). It further changed the custody of the child (Cruel and unusual punishment, Amendment 8).

STATEMENT OF GROUNDS ON WHICH JURISDICTION IS INVOKED

The jurisdiction of this court is sought to review two final judgments of contempt against appellant wife of respondent upheld by the intermediate and highest courts of review of the State of New Jersey.

This writer seeks review in this Court on the subject of whether local New Jersey State Statute 9:2-2 which states that a child born in New Jersey can never be removed during its minority from the State without the consent of both parents is unconstitutional and repugnant to Article IV of the United States Constitution, resulting in violations of appellants rights under the Article 4, 8th and 14th Amendments of the United States Constitution. Said statute as utilized in the case at bar was used to abridge and deprive Gussie

Joffe, appellant, wife of respondent, and the infant issue of the parties of their rights to have a New York Supreme Court final judgment of separation, which was contested given full faith and credit in the State of New Jersey, deprived her and the infant of their adjudicated right to custody, alimony and support, their liberty and freedom and changed custody of a child which was cruel and inhuman punishment.

Because of the infant issue of the parties being born in a New Jersey hospital, said statute was used by appellee, an affluent absconding New York domiciliary (against whom appellant was awarded a final judgment of separation for extreme cruelty, nonsupport and abandonment giving support and custody of the child to the wife) to commence an action for custody in the State of New Jersey of an absent child domiciled and resident in New York, obtain in New Jersey restraints against the wife from proceeding to collect support in New

Jersey, and on the wife's motiton to dismiss the New Jersey action, alleging her constitutional right of respect for her New York judgments, the New Jersey Court held that said statute gave it authority to investigate the jurisdiction of the New York Court. Thereafter though the New Jersey Court on investigation admitted the husband litigated jurisdiction in New York on a special appearance it proceeded to relitigate the issue of domicile and all of the marital issues litigated in New York, arrive at a different decision, deny full faith and credit to the New York decree and order the wife to vacate her New York judgment or go to jail, and as punishment changed custody of the child.

Said statute by conferring jurisdiction of an abbent child on New Jersey to entertain a custody suit and utilization of restraints entered in the New Jersey Custody suit enabled the absconding father to maintain said custody suit on trial so that defendantcould not have

access to the Appellate Courts, for six years in New Jersey and successfully withheld support awarded by the New York Court for medical and rehabilitation expense of this child, kept the child's schooling and home, always temporary, his future in a state of suspension, subjected him to traumatic experiences of prolonged trial, and physchiatric tests. Said statute during the entire formative years of the child's growth totally deprived the said child and the appellant of adjudicated property rights, support and the duties cast upon the appellee by the Courts of the State of New York, in a contested matrimonial proceeding between the parties.

And said statute was used to confer jurisdiction on the New Jersey Court to enter illegal restraints restraining the wife from proceeding in New York to collect on her judgments.

child and refusing to permit his loved step-brothers and sisters who had been raised with him to be with him or talk to him.

Thereafter New Jersey Supreme Court Judge Concilio two years after the motion to dismiss the New Jersey action was made and two years after the New Y rk final judgments were entered awarding custody and support to the child among other things, and after issuing restraining orders restraining the payment in New York of any support to the child, and while the husband refused to exercise visitation, took testimony on the jurisdiction of the New Jersey Courts to entertain the custody action of this child under NJSA 9:2-? in violation of the Full Faith and Credit Clause of the Constitution and determined it had jurisdiction of the absent child by virtue of the above statute and so jurisdiction to enter restraints. The Court referred the motion to New Jersey Superior Court Judges Duffy and Nimmo who found the wife in contempt for entering support orders

and collection of support in New York and found the wife in contempt of court for violating restraining orders restraining her from proceeding to take money from the New York receiver and collecting money judgments in the State of New York and using sequestered funds for the support of the child. It fined her $3500. (excessive fines under 8th Amendment) for failure of the husband to pick up the child approximately 50 times in the two years which he had refused to see the child and awarded custody of the absent child to its non-supporting non-visiting father (cruel and inhuman punishment), who had neither seen or supported the child in almost 2½ years and refused the child access to step-brothers and sisters then residing with a former wife, but who had been raised and educated by the infant's mother.

The contempt orders ordered the wife to vacate all of the New York orders and judgments or go to jail. (Refusal of full faith and credit under the 4th Amendment) and changed cus-

tody to the father (cruel punishment). The husband respondent was $40,000. in arrears of support payments in New York and $4,200. in arrears of $35. weekly support payments awarded in the interim order in New Jersey. Counsel fees were denied the wife on behalf of the child and the New Jersey custody action after 2½ years was moved to trial. The Appellant remained outside the jurisdiction of New Jersey and could not enter to testify (deprived of civil rights).

Warrants of arrest were issued out of the Superior Court of New Jersey to apprehend the wife petitioner and incarcerate her until she vacated her New York judgments, orders and decrees. Thus based on denial of full faith and credit this was deprivation of liberty without due process (14th and 8th Amendments). Meanwhile, two and a half years earlier the Respondent had signed an assignment assigning away the assets sequestered in the State of New York and the wife became the sole support of the child then under intensive medical care to save his eyesight.

QUESTIONS PRESENTED:

1. Under New Jersey local Statute NJSA 9:2-2 which provides:

> "When the Superior Court has jurisdiction over the custody and maintenance of minor children of parents divorced or separated or living separate, and such children are native of this State, or resided five years within its limits, they shall not be removed out of its jurisdiction without the consent of both parents."

is a three year old child born by happenstance in a New Jersey hospital deprived of its right to claim a state's parens patriae jurisdiction in any state where it may be found or is said statute discriminary against children born in New Jersey and so violative of the Fourteenth Amendment of the United States Constitution.

2. Is NJSA 9:2-2 unconstitutional in that it discriminates against children born in a New Jersey hospital or residing in New Jersey five years though domiciled elsewhere, in that such child cannot during minority

acquire the domicile of the parent which supports and nurtures it, after abandonment by the other parent, and is deprived of its right to become a domiciliary of another state during its minority contrary to the Fifth and Fourteenth Amendment and the Fourth Article of the United States Constitution.

3. And is NJSA 9:2-2 not unconstitutional as being repugnant to the full faith and credit clause of the Constitution and the equal rights clause of the Fourteenth Amendment in that any child residing five years in New Jersey or born in a New Jersey hospital could have no other domicile in the world throughout its minority even though a competent court of another state wherein the child is then residing and supported adjudicates the child's domicile, right to support and custody elsewhere in a valid proceeding entitled to respect and recognition under the Constitution. And where the said statute is used to confer jurisdiction

on a court to relitigate those issues litigated elsewhere prior thereto, does not such denial of full faith and credit result in denial of equal privileges under the Constitution since such children, are not entitled to parens patriae protection of any state in which they may be found physically or in which their parents reside, as can other children citizens of the several states - particularly as used in the case at bar where the state in which the child physically resided awarded said child to its mother and $200. per week support from its father whereas New Jersey refused to enforce said custody or support provision, subjected the child to a six year custody relitigation, making an absent child a ward of the New Jersey Court, making its future uncertain, schooling always temporary and giving it only $35. weekly support from an affluent father without taking testimony, subjecting the child to psychiatric tests and other trauma, depriving the said child of due process of law, equal

privileges and procedural due process, under the Fourteenth Amendment, and its right to have its judgment given recognition under Amendment IV, which custody action continues to date after six years on trial.

4. Where a New York Court in a separation action on challenge to its jurisdiction by the appellee husband, held it had jurisdiction and proceeded to judgment upon the jurisdictional and matrimonial issues; was not its determination entitled to full faith and credit and enforcement in New Jersey? Requiring the New Jersey Superior Court to dismiss an action seeking to relitigate those issues and the domiciliary issues decided in New York all of which respondent sought to relitigate in a New Jersey custody action of an absent child based upon the above statute. And was not the above statute unconstitutional in the manner of its utilization and on its face in that it was used to confer jurisdiction on a New Jersey Court to relitigate domicile of the

parents in a custody action of an absent child and relitigate all of the marital and custody issues litigated in a separation action between the parents in another state. Then having established domicile in the relitigation of domicile in the custody action the court then proceeded to permit the respondent to bring a multiplicity of suits based on the relitigated domicile resulting in the following additional constitutional deprivations repeated violations of Appellee's constitutional rights and those of the infant raising the following subordinate questions.

(a) Whether local New Jersey Statute NJSA 9:2-2 as used in the case at bar to confer jurisdiction on the New Jersey Superior Court to entertain custody and replevin action (subsequently amended to add a cause of action for an injunction restraining the wife from litigating any of her matrimonial rights in any state other than New Jersey) which actions deprived appellant of her

right to have respect given to her New York final judgment of separation is unconstitutional and repugnant to Article IV of the United States Constitution. And as a result of that violation does it not become repugnant to the Eighth and Fourteenth Amendments of the Federal Constitution in that not only does it abridge appellant's right to respect for her New York judgments, but in so doing results in denial to her of equal rights and immunities, the right to procedural due process and takes property without due process of law - all solely because she had a child bron in New Jersey.

Whether under the above statute the Superior Court of New Jersey in a custody action of an absent child commenced by a father, wherein the mother was served personally in New Jersey can issue an order to arrest the mother of a three year old child born by happenstance in a New Jersey hospital which

order based upon a relitigation of domicile, requires her to remain incarcerated until she vacates a bona fide two year old contested judgment of separation of another State wherein all parties resided throughout the marriage (which judgment adjudicates jurisdiction, custody, domicile, marital res, support, right to restraints, rights to furniture and personalty and all of the marital rights of the parties) thus depriving the mother of her right to have her judgment given full faith and credit under Article IV of the Constitution and abridging her right to equal privileges and immunities under Amendment Fourteen, - All by reason of the fact she had a child born in New Jersey. And since the order of arrest was entered during trial and she is subjected to arrest upon entering the State of New Jersey, she cannot defend the relitigation of the custody action which has a second count for replevin of furniture, is she not deprived

of property without due process of law?

b) Is a child of three years, born in a New Jersey hospital of parents residing in New York, of a mother resident through the marriage and working continuously in the State of New York, whose father has abandoned it and refused to support said child, deprived of its right to acquire the domicile of its mother who supports and nurtures it, by virtue of the fact that the father is able to abscond to the State of New Jersey where the parents maintained an auxiliary residence, thus, permitting the father to avoid the duties cast upon him by a bona fide contested New York separation judgment by claiming the child was removed from the State of New Jersey under local Statute NJSA 9:2-2. And is said statute thus not repugnant to Article IV and Amendment Fourteen of the United States Constitution in that it abridges the child's right to have its judgment given full faith and credit, equal rights and immunities, and right to have due process of

law and finality of litigation.

c) May a wife who has commenced a separation action in New York State (where the parties resided throughout the marriage, attaching furniture and other assets of the husband because he has absconded, and after attaching the infant issue of the parties physically present in New York by an interim custody order and who served the husband in New Jersey - after the husband enters an appearance in New York challenging jurisdiction and effecting simultaneously a general appearance in New York - thereafter be served with a complaint for custody of the same child, (absent in New Jersey) under NJSA 9:2-2 and replevin of the same furniture, and after New York litigated jurisdiction, finding jurisdiction in New York, be forced to relitigate jurisdiction and the matrimonial issues 2½ years later in New Jersey and be ordered to vacate her New York final judgment of separation awarding her custody, maintenance, support and ownership of furniture or go to

jail for contempt of New Jersey Courts?

Or is this failure to grant full faith and credit and thus repugnant to the Constitution under the Supreme Court of the United States holding of Durfee v. Duke, 375 US 1 Ed. 2d and the cases cited therein of Treines v. Sunshine Mining Co. 308 US 66 84 L Ed 85, 60 S Ct. 44, Davis v. Davis, 305 US 32, 83 L Ed 26, 59 S Ct. 3, 118 ALR 1518; forbidding the relitigation of jurisdiction and granting finality of litigation and forbidding multiplicity of suits - particularly where the first court had already litigated jurisdiction on the defendant spouse's challenge.

d) Whether NJSA 9:2-2 is repugnant to the United States Constitution in that a parent domiciled in New York, because it has a child born in a New Jersey hospital is deprived of its right to adjudicate its marital rights in the state of said parent's domicile, as can parents of the several states, including custody of said child, but not limited

thereto, or is it bound (because New Jersey refused respect) to have an adjudication of jurisdiction and marital rights first in a New Jersey custody action in the State of New Jersey before it can proceed in a marital action in any other state (depriving said parents of due process, full faith and credit and privileges and immunities of citizens of the several states.

e) Where a wife commences an action for separation in New York one of two states in which the parties have resided in two homes since the marriage and the husband appears by his attorney in New York and challenges jurisdiction and in his affidavits argues the merits of the cause effecting a general appearance and where the wife is thereafter served personally in New Jersey with a complaint under NJSA 9:2-2 for custody of an absent child and replevin of furniture, which child and furniture were and are present in New York, and she promptly obtains restraining orders in both states restraining the husband from proceeding in New

Jersey, can the husband thereafter in violation of the wife's restraints obtain an illegal restraint ex parte against the wife restraining her from proceeding in New York (without the two days' notice required by the wife's restraint against the husband) without knowledge or notice, without a telephone call to opposing counsel, but on a private conversation with the Court. And can said last restraint restrain the wife from proceeding with the New York separation action first begun, after New York finds jurisdiction in New York of the marital res, when the child, the wife and the furniture were at all times physically present in New York from whence the appellee husband had absconded, or is this lack of due process under the Fourteenth Amendment and the failure to give full faith and credit.

f) In an action commenced under N.J.S.A. 9:2-2 whether the taxing of fines of $50. each day of each weekend the appellee did not have visitation with his child in New Jersey

under a New Jersey Court order (entered subsequent to a New York order where the child was physically present at all times) which ordered single day visitation prohibiting the removal of the child from New York - (which appellee refused to exercise) and the changing of custody of the child as a punishment of the mother for contempt is not exeessive fines and cruel andinhuman panishment under the Eighth Amendment.

g) Whether the refusal of the Supreme Court of New Jersey to remand the contempts for full hearing (the wife rested on the jurisdictional question during contempt hearing) is deprivation of property without due process of law,lack of procedural due process under the Fifth and Fourteenth Amendments under the holdings of the supervening decision of the United States Supreme Court in the case of Townsend v. Sain (372 US 293).

k) Whether under NJSA 9:2-2 the fact that appellant is the mother of a three year old

child born by happenstance in New Jersey hospital, deprived her of the finality of litigation guaranteed by the United States Constitution, Amendment IV as ennunciated by the Supreme Court of the United States in Durfee v. Duke, supra and the cases cited therein or deprives her of her right to due process. And must she litigate her marital rights in a custody action based upon a custody complaint contrary to the United States Supreme Court holding in Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624, 40 A.L.R. 937 (1925) and Halvey v. Halvey which cases held that the presence of a child within the state did not confer on the parents the right to litigate their differences in a custody action. "Parents so situated" must litigate their rights at home.

1) Whether plaintiff having served defendant, a resident of New York, personally in New Jersey with a complaintfor custody of a child, under NJSA 9:2-2 can amend said custody action to add a cause of action for a permanent

injunction enjoining defendant from proceeding to enforce a New York bona fide contested judgment of separation providing alimony and support by serving an amended complaint by mail or is this deprivation of due process under the Fourteenth Amendment, thus adjudicating parental rights in a custody action, contrary to the Supreme Court holding in Finlay v. Finlay supra.

And can said statute be utilized as a means of effecting a "holding operation" deliberately keeping a trial pending for six years during which appe llate courts refused to entertain the interim jurisdiction order while the husband obtains a unilateral divorce in New Jersey based on New Jersey's relitigation of jurisdiction and finding domicile in New Jersey contrary to the finding of domicile in New York by the New York Courts. And can the contempt order which takes four years on appeal to the Supreme Court of the United States while the wife is excluded by the order

of arrest from entry into the State of New Jersey to defend said actions be a means of the husband obtaining uncontested judgments in the State of New Jersey enabling him to partition property and dispose of his assets so that by the time the wife obtains recognition for her New York decree, she is armed with a hollow victory, having lost her marital status, her property during the six years of the pending litigation and the appeals, while the child grows to manhood without support of an affluent father, depriving the child and wife of their adjudicated support, a speedy trial, procedural due process and property without due process of law.

CONSTITIONAL AND STATUTORY PROVISIONS INVOLVED

NJSA 9:2-2 states: "When the Superior Court has jurisdiction over the custody and maintenance of minor children of parents divorced or separated or living separate, and such children are native of this State, or resided five years within its limits, they shall not be removed out of its jurisdiction against their own consent, if or suitable age to signify the same, nor while under that age without the consent of both parents, unless the court, upon cause shown, shall otherwise oreer.."

United States Constitution, Article IV Section 1, "Full Faith and Credit shall be given in each State to the Public Acts, Records and Judicial Proceedings of every other state. And the Congress may by general laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

"Section 2. The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."

United States Constitution, Amendment VIII "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."

United States Constitution, Amendment XIV, Section 1. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abrdige the privileges or immunities of citizens of

the United States; nor shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

New York Civil Practice Act,
"Section 1165a Conditions attached to maintenance of action for annulment or separation. An action to...or for separation may be maintained in either of the following cases:

1. Where both parties are residents when the action is commenced.

2. Where the parties were married within the state and either the plaintiff or the defendant is a resident thereof when the action is commenced and has been a resident thereof for at least one year continuously at any time prior to the commencement of the action.

3. Where the parties were married without the state, and either the plaintiff or the defendant is a resident of the state when the action is commenced, and has been a resident thereof for at least one year continuously at any time prior to the commencement of the action. (Added L. 1942, ch. 288, September 1)."

Sec. 1166. Residence of married woman in action for..separation. If a married woman dwells within the state when she commences an action against her husband for divorce or separation, she is deemed a resident thereof, although her husband resides elsewhere."

6. Restatement of the Law of Conflicts Section 117:

"A state can exercise through its courts jurisdiction to determine the custody of children only if the domicile of the person placed under custody or guardianship is within the state."
(Volume page

(The above is in addition to those set forth in the original writ.)

STATEMENT OF THE CASE

Petitioner refers the Court to the Chronology of legal events, pages 7 - 19 of the original writ hereinafter set forth in short narrative outline for the sake of brevity.

In 1962 the three year old Joffe child, was residing in the State of New York where he was attending nursery school and had resided throughout the three years of his life, though he was born in a New Jersey hospital because his father was a surgeon there. Said child, a gifted, legally blind boy, had been abandoned, financially, physically and emotionally by his father and was being supported wholely and totally by his mother, who is practicing law in New York and had throughout the marriage. His much-married father, appellee-respondent had abandoned the home seeking to marry yet again.

In June of 1962 the Supreme Court of the State of New York sequestered respondent's assets in New York and ordered a Receiver in Sequestration to hold the same subject to the

order of the Court for the purpose of support, nurses and medical attentions among other things for the said child, which the said receiver did.

On July 12th the Supreme Court of the State of New York issued an order in Petitioner's separation action commenced there granting interim custody of the child to his mother and ordering the plaintiff-appellee father to show cause why custody pendente lite should not be awarded to the mother in a separation action; as part of the cruelty alleged in the separation action the mother recited failure of the respondent to provide urgent medial attention for the boy, heat and food and other acts of physical cruelty to the child. As part of the abandonment she alleged he kept the New York apartment and a New Jersey alternate house and the latter he abandoned, saying it was too far from his office, though it was but a 15 minute drive, and the former of which he had already removed the furniture from.

On August 11, 1962 the Supreme Court of the State of New York ordered the respondent husband to show cause why money should not be withdrawn from sequestered funds for thepayment of support for the child, his nursemaid, medical attention and the taxes and mortgage on his home.

On July 11th the respondent (who refused to see the child, talk with the child or permit the child's step-brothers or step-sisters with whom he had been brought up to see or speak with the child and refused even to talk with the child on the telephone), appeared by New York counsel and moved to vacate the service of the summons and complaint in the separation action (which was to decide the custody of the child) on the ground that the Court had no jurisdiction of the subject matter, the marital res, the child or of him personally.

In the affidavits on the said motion the plaintiff-appellee argued the merits of the separation complaint and effected a general appearance in the New York action. In the said affidavits he also argued against the merits of the motion to withdraw monies from sequestered funds for support of the child and against a pendente lite support motion.

On September 11, 1962*, the New York Supreme Court adjudicated that New York Courts had jurisdiction of the marital res of the child and the parties stating (See Appendix D, p. D-1) (Order of Klein, J. Dated September 11, 1962).

* Note the Chronology of events in error listed. Judge Klein's jurisdictional decision on September 17, it was issued September 11th. This is important because this is the decision in the record which shows that New York had jurisdiction of the marital res prior to the commencement of the New Jersey custody action wherein Gussie Joffe was served August 23, 1962. See p. 10 of the original writ.

And on September 25th the New York Court ordered the Receiver in sequestration to make payments of support to the infant issue of the parties as well as payments of mortgage and taxes on his home and other expenses.

Throughout the year the child received medical care from the receiver in sequestration and support. No funds were forthcoming from the father, personally.

In October of 1962 the plaintiff-appellee father moved to vacate the order of sequestration and prohibit the child from receiving support from the receiver out of the assets sequestered belonging to his father. The motion to vacate was denied and the Supreme Court of the State of New York issued an injunction staying the father, plaintiff-respondent from proceeding in an action for custody of the child brought in New Jersey where he served the wife petitioner with a complaint for custody of the child under the New Jersey Statute in question. The Complaint requesting custody

of the child specifically alleged jurisdiction under Statute NJSA 9:2s2.

In September of 1962 the wife moved to dismiss the New Jersey action on the ground the infant was physically present in the State of New York, jurisdiction and marital res had been adjudicated in New York on the husband's challenge and the State of New Jersey had no jurisdiction to entertain the custody action under the said statute of an absent abandoned child who was a New York domiciliary and being supported in New York by its mother, citing constitutional grounds. The mother also obtained a restraint in New Jersey (Sept. 20, 1962 restraining the husband from proceeding with the New Jersey action. Said restraint stated on its face it could not be vacated except on two days notice. On Sept. 21, 1962 in derrogation of the two existing restraints, one in New York and one in New Jersey, the husband respondent obtained a restraint against the wife without notice or hearing (let alone 2 days notice), from proceeding in the State of New

York to obtain support for the child from his moneys. The receiver in sequestration in New York however, continued to enter orders and pay out monies for the support of the child.

In direct abrogation of the New York care and protection of said child the State of New Jersey on Sept. 21, 1962 entered the foregoing restraint - an order prohibiting the wife from proceeding with the New York action and the custody, and collecting money without ruling on the wife's motion to dismiss the New Jersey action on Constitutional grounds and with no hearing on its jurisdiction to enter such restraint and on Dec. 19, 1962 with no hearing or testimony on standard of living, the New Jersey court issued its own order of support for the child of $35. per week, awarding weekend visitation to the husband (he to pick up the child), stripping the child of the care, funds and protection of the State of New York wherein he was living.

The father respondent thereafter moved in New York for an order restraining the wife

from proceeding to collect or enter orders for monies to be collected from sequestered property for the child and offered in evidence the New Jersey restraining order asking the New York Court to restrain the mother from collecting the $200. per week under the pendente lite support order of New York. The New York Court however refused enforcement of the New Jersey restraint and specifically stated it did not reach the receiver - an officer of the court. The New York receiver in sequestration continued to pay money for the support of the child, paying the nursemaid and mortgage, taxes and repairs on the house. From time to time thereafter New Jersey entered restraining orders to restrain these payments against the wife and plaintiff- respondent husband sent said orders to the New York Court which refused them efficacy. Meanwhile the New Jersey restraint of September 20, 1962 of the wife restraining the husband from proceeding in the State of New Jersey was still in effect, and continued.

New Jersey counsel for the wife moved to vacate the September 21st restraint of the husband against the wife, but said motion was carried undecided together with all restraining orders for two years. Thereafter the New Jersey Court was asked by the father to make the infant (absent) a ward of the New Jersey Court based upon the claimed unconstitutional statute.

On December 3, 1963 after the receiver in sequestration moved the New York case to trial the Supreme Court of the State of New York entered a final separation judgment giving the infant $200. per week, awarding his custody to his mother, with Sunday visitation to the father and prohibiting the removal of the child from the State of New York. Thereafter the State of New Jersey moved to make the child, then always absent, a ward of the New Jersey Court. Said motion was on the motion of a father wholely and totally not supporting the child, refusing to see or talk with the child, refusing to exercise Sunday visitation with the child.

THE NEW YORK ACTION

Defendant wife on December 3, 1963 was granted a final judgment against plaintiff husband by the Supreme Court of the State of New York on the ground of cruel and inhuman treatment, abandonment and non-support.

Said judgment in part, stated as follows: (AP. G)

> "The plaintiff having been duly personally served with summons and verified complaint outside the State and the defendant having appeared generally in this action by his attorney, Benjamin Lichtenstein, of 332 East 149th Street, Bronx, New York, giving this Court in personam jurisdiction of his person..." (underscoring mine).
>
> "ORDERED, ADJUDGED AND DECREED that the plaintiff GUSSIE JOFFE be and she hereby is separated forever from the bed and board of the defendant, SIDNEY H. JOFFE, as prayed for in the complaint herein, because of the cruel and inhuman treatment, abandonment and non-support of plaintiff by defendant, and it is further
>
> "ORDERED, ADJUDGED AND DECREED that the defendant shall have the right to have visitation of PHILIP LEWIS JOFFE, the issue of the marriage every Sunday of each week commencing on the 22nd day of November, 1963 between the hours of 9:00 A.M. and 5:00 P.M.; but at no time is he to remove the said child from the jurisdiction of the said Court; and it is further
>
> "ORDERED, ADJUDGED AND DECREED that the

plaintiff have the care and custody of PHILIP LEWIS JOFFE, an infant, the issue of the marriage, and it is further

"ORDERED, ADJUDGED AND DECREED and found by this Court that both plaintiff and defendant were domiciliaries of the State of New York continuously throughout the entire marriage to the date of the entry of judgment herein, that the matrimonial res has been at all times since the marriage in the State of New York and continues so to be and the infant has since birth been domiciled in the State of New York, and it is further

"ORDERED, ADJUDGED AND DECREED that plaintiff is to receive from the defendant the sumof $500. per week for support and maintenance of herself and support and maintenance and education of the infant issue of the parties ($300. of said sum being allocated to the plaintiff and $200. to the infant issue), and it is further

"ORDERED, ADJUDGED AND DECREED that plaintiff is the sole owner of all furniture furnishings and personalty listed as paid for by her or given asgffts to her as indicated in the various schedules of"Exhbit 9" in evidence on the hearing of November 4, 1963, and it is further"

"ORDERED, ADJUDGED AND DECREED that judgment is hereby entered against the defendant in favor of plaintiff for the sum of $5,696.00 representing arrears of alimony and support pendente lite and the sum of $2500. attorneys fees awarded previously by the Court, and it is further...."

Simultaneously with the entry of said final judgment of separation, the said Supreme Court

Judge Thomas A. Aurelio made, signed and entered findings of Fact and Conclusions of Law wherein he adjudged that the defendant-husband therein had appeared generally, contested the New York action on the merits by his attorney, Benjamin Lichtenstein of New York City and that the New York Courts had in personam jurisdiction of his person, from the date of service of the summons upon him, ie. July 12, 1962 under Sec. 232 of the Civil Practice Act of New York.

It should be noted, and it is irrefutable, the very domicile (apartment of the child, the only issue of this marriage, and the furniture and furnishings were at all times prior and subsequent to the commencement of the New York action, physically present in the State of New York, where the husband had established them, abandoned them in New York, and still so remain, the furniture was held by sequestration.

The New York Complaint alleged that the parties had at all times resided in both the

the State of New York and the State of New Jersey. The parties had two marriage ceremonies, one a civil one in New Jersey and a large religious and civil ceremony in New York, and had occupied a New York apartment throughout their marriage. In the years 1959 to 1962 they simultaneously occupied a New Jersey mansion which latter masnion had been purchased for the purpose of conversion into a Convalescent or Senior Citizen's Home (the husband is a physician). During the conversion and while awaiting a zoning variance the parties had occupied the said mansion temporarily with the three children of the husband's first marriage which children were residing temporarily with the parties until their mother (who had their legal custody) found them a new home with her (she had sold her previous home). The parties had also occupied a New Jersey home previously owned by the husband and his first wife, while awaiting a sale thereof.

Although Appellee had always lived in New

Jersey, at the time of meeting and marrying Appellant, appelleee had advised her that due to the undesirable newspaper notoriety accompanying the breakup of his first marriage he wished to disassociate himself from his New Jersey community where none of his neighbors spoke to him and reside in New York.

Throughout the entire marriage, and every single day thereof the parties and the sole infant issue of the marriage had maintained and lived continuously in a New York apartment, first at 139 East 35th Street and then 44 East 67th Street, and the defendant wife had resided in said same apartment for 14 years prior thereto, and still continues to so reside with the infant.

Prior to abandoning the wife, the husband persuaded her to take a larger and more luxurious New York apartment (the 67th Street apartment) stating that he had put up the New Jersey mansion for sale (and actually listing it with realtors) and he moved the more valuable pieces

of furniture from New Jersey into New York, spoke with realtors in New York who obtained a New York apartment for him, moved from the smaller New York apartment to the larger one, thereafter talked with the Superintendent of said apartment house about suggested decoration and changes in said apartment and continued to live with the wife for nine months in the New York apartment - taking the children of the previous marriage, whom plaintiff had raised from childhood, and placing them with their married sister in New Jersey. He arranged charge accounts under his signature in New York for the 67th Street, New York apartment, placed the infant issue of the parties in a New York school and advised the wife that henceforth there was to be no New Jersey home excepting for an apartment in New Jersey surreptitiously taken by the husband ostensibly for the oldest son of the first marriage who worked near said apartment, a small two room flat near a veterans project. The husband advised

the wife that he would "sleep-over" in New Jersey in his son's said apartment on nights when he had emergencies at thehospital in New Jersey where he was an attending physician.

In tru th and in fact this was pursuant to a scheme to obtain the wife's signature on a deed to sell the Montclair New Jersey mansion (which was originally taken as a business venture by the parties) and invest the proceeds in the stock market where the husband by his plunging and acting on irresponsible tips had become financially involved in disastrous stocks and was desperate to save his margined assets. In addition the much-married respondent was seek ing to marry yet again. In June of1962, because the wife refused to sell the $100,000. property to invest the proceeds in the market and after cancelling all of the wife's charge accounts, her insurance and notifying her he was leaving her, the husband moved back to New Jersey into his son's apartment, refused a key to said apartment to the wife, refused her entrance thereto and threatened to call police when she came

over with the child who asked for his father.

The husband had throughout the marriage, supported and maintained the New York apartments, kept his most expensive clothing and art treasures, there, maintained all of his business investments through New York brokers and trustees, did all of his socializing with the exception of large parties there, maintained all of his charge accounts in New York, giving the New Jersey address to avoid taxes and large insurance payments for their several automobiles. The husband from the outset of marriage had insisted that the wife continue to practice her profession - law - in New York and maintain a domicile in New York so that she could aspire to a political career, her law practice and the New York domicile. It is significant to note that such political career absolutely requires New York residence.

The wife paid Federal Taxes in New York, the State residence tax and was permanently registered democratic in New York as a voter through-

out the marriage. The husband, a republican maintained his New Jersey voting so as not to embarrass his wife publicly and politically, and because his hospital affiliations and work was in New Jersey and same were intertwined with his politics.

FILED PAPERS IN THE
NEW YORK ACTION

Defendant Gussie Joffe, instituted suit in the State of New York on Jun3 21, 1962 seeking a separation from plaintiff, her husband, based on cruel and inhuman treatment, abandonment and non-support. In the same action she also sought custody of the infant child of the marriage.

Pursuant to New York practice, a writ sequestering plaintiff's asset in New York State was issued by the New York Court with the complaint. This writ, a summons and the complaint were personally served on plaintiff in New Jersey.

Justice Flynn of the New York Supreme Court signed an order on July 12, 1962 compelling

plaintiff to show cause why custody should not be given to the defendant and why the defendant should not have alimony and counsel fees pendente lite. This order temporarily granted custody to defendant [redacted]. On July 22, 1962 the return day of the order, plaintiff appeared by his counsel in New York seeking an adjournment of the matter and obtained it.

The New York Supreme Court, by Miss Justice Amsterdam, about two weeks later, issued an order directing plaintiff to show caus why moneys should not be withdrawn from his sequestered assets to pay for support of the child, a nursemaid, and the mortgage and taxes on the property owned by the parties in Montclair, New Jersey (appendix D, p. D-1)*

The plaintiff husband appeared in the New York action by his New York counsel and on August 14, 1962 moved to vacate the service of the summons and complaint for lack of jurisdiction of the person and subject matter, the infant and the furniture, on the ground

* All references to Appendix means Appendix to original writ.

that the parties were domiciliaries of the State of New Jersey (where the husband had always maintained a medical practice with his brother who resided in New Jersey),'

He put in an affidavit which read in part:

> "I cannot at this time meet some of the issues created by the plaintiff without avoding a general appearance and I ask the court to take this factor into consideration. However, I have been advised that the plaintiff (defendant herein) has made the necessary current payments to the bank so that there is no immediate danger of foreclosure".

This affidavit arguing merits filed in opposition to themotion for alimony add support and to withdraw monies from sequestered funds; effected a general appearance by the husband defendant appellee in New York.

Voluminous and exhaustive affidavits were submitted by both parties on the subject of jurisdiction, residence and domicile. Both parties submitted licenses, autbmobile ownerships, charge accounts, tax forms, bank accounts, religious affiliations, voting registration, social activities, doctors locations, etc. The wife submitted, as exhibits, sworn

affidavitsof the husband wherein in other law suits in New York he had designated himself as "residing at 139 East 35th Street, New York, City..." the New York apartment of the parties and "maintaining a house in New Jersey".

The New York Supreme Court (Klein, J. Sept. 12, 1962), Appendix D[illegible] denied the plaintiff husband's motion to dismiss the New York separation action for lack of jurisdiction, domicile and residence and held that sufficient had been shown to clearly prove that the parties resided in New York (residence in matrimonial actions in New York is synonymous with domicile) and that New York had jurisdiction of the action.

In his motion to reargue (by letter addressed to Justice Klein dated Sept. 10, 1962 he said his motion for reargument was made for the following reasons:

"(1) Your Honor's opinion does not indicate whether defendant is a New York or New Jersey resident;

" I do not believe that an award can be made for the support of issue of the marriage separate and distinct from the award of temporary alimony to the wife. In addition the defendant has been sending the sum of $35. per week for the support of the infant even though the plaintiff has not permitted visitation by the defendant. "

(3) There is nothing in the order of sequestration signed on June 21, 1962 by the Hon. Francis X. Conlon authorizing the Receiver to may any payments in connection with the operation of real estate in the State of New Jersey. Furthermore, I do not believe that the real estate in the State of New Jersey is subject to the jurisdiction of this court.

(

These arguments specifically effected further general appearance, see Matthew v. Matthew, 14 App.Div. a case on all fours in New York, 217 N.Y.S 2d 736.

On September 25, 1962 an order was entered by Justice Klein embodying his September 12 denial of plaintiff's motion to quash service. On the said day the same justice denied reargument requested by plaintiff and adhered to its original decision of September 19 (P. 12 original writ) It denied the motion to dismiss for lack of

jurisdiction, granted support and ordered the husband's New York receiver who had attached the husband's New York assets as well as the furniture in New York to pay out monies for the support of the wife and the infant child.

Subsequent to the New York Court's denial of plaintiff husband's motion to dismiss for lack of jurisdiction and after losing all three motions the husband filed notice of appeal to the Appellate Division of the Supreme Court of New York, but never perfected the said appeal. Thereafter the husband, by his New York Counsel:

1. Argued motions for custody of the child, alimony, counsel fees, child support and a motion to withdraw money from sequestered funds before New York Supreme Court Judge Klein;

2. Moved to intervene in, and argued a motion to punish the husband's trustee for contempt for failure to turn profits of a trust over to the Receiver in sequestration(before New York Supreme Court Judge Chimera) for the support of the wife and child in accordance with previous court orders;

3. Moved to vacate the order of sequestration; which had attached the important antique furniture of the parties, before Judge Chimera of the New York Supreme Court;

4. plaintiff successfully defended a motion to restrain him before Judge Aurelio and requested a restraint, and litigated the validity of 2 New Jersey restraints.

5. moved to stay the New York Supreme Court before Judge Aurelio;

6. and otherwise appeared generally and argued the merits of the case after losing the jurisdiction motion. (See Appendix F, pF-1)

Thereafter, in the said New York suit, the wife moved for a declaration by the Court that by his activities in appearing and arguing the various motions and presenting arguments on the merits in the New York separation action the plaintiff had made a general appearance in the New York Suit. In answer to the said motion plaintiff interposed copies of

the New Jersey Superior Court preliminary restraining orders. The said motion for a finding of general appearance in New York was granted. A copy of the order thereon (Backer, J. Jan. 11, 1963) is before this Court, in Appendix F of original writ, p. F-1)

New York Supreme Court Judge Backer said:

"ORDERED AND DECLARED that the defendant by his participation in the case as set forth more fully herein has appeared generally herein."

"ORDERED AND DECLARED that the defendant has submitted himself generally to the jurisdiction of this Court conferring in personam jurisdiction over his person in the within case."

NEW JERSEY ACTION

Subsequent to the commencement of the New York action the plaintiff husband, after entering a general appearance in New York (and after losing the jurisdiction motions), ran across the river to New Jersey and brought an action in New Jersey (on the same issue of custody and furniture between the same parties which were in issue in the New York action and on which

the New York judgment was res adjudicata):

1) For custody of the infant son of the parties (said child was at all times physically present andresiding and attending school and camp in the State of New York).

2) Replevin of the furniture which had already been attached by the order of sequestration in New York (and the validity of which attachment had already been litigated when the husband by his New York attorney moved to vacate the order of sequestration and lost).

At the time of the commencement of the New Jersey suit an order granting the wife custody of the child had already been granted in New York where the child was living and had lived since birth (although he was born in a New Jersey hospital) and the furniture had already been attached in New York and the plaintiff husband had already appeared as plaintiff by his New York Counsel, Benj. M. Lichtenstein, Esq. of 244th Street, New York,

New York (his first cousin) in the New York proceedings and had argued the merits of the case.

The plaintiff wife moved to dismiss the New Jersey action on the ground the child being physically present in New York, said State was the only State standing in Parens Patriae to said child, New Jersey had no jurisdiction, and on the ground that New Jersey is required to give full faith and credit to the findings of the New York Court on the litigated question of jurisdiction rasied on the husband's own motion by his New York counsel in the New York action and having been participated in by both parties and decided in New York and which was res adjudicata.

Two years after the New York final decree and 2½ years after institution of the motion New Jersey (Concilio, J.) finally ruling on said motion found that NJSA 9:2-2 gave New Jersey jurisdiction to entertain the custody suit and denied full faith and credit to petitioner and did the following: (Appendix B, p. B-1)

1. Refused to dismiss the New Jersey action but

2. Took testimony on the question of

jurisdiction.

3. Asked to review the papers that had been filed in the New York Courts;

4. Presumed to review the decision of the various(eight) judges who decided the various litigated motions in New York Courts;

5. Ignored the fact that the husband had litigated New York's right to attach the furniture (which order of sequestration plaintiff had moved to vacate in New York and lost) and;

6. Ignored the fact that the husband had litigated the New Jersey restraints and New York denied them efficacy.

7. Stated that based upon his review of the New York filed papers, filed in New York County Clerk's Office, the various Judges who decided the various motions on the said filed papers in the New York Courts had been erroneous in their findings, that the parties were not domiciliaries of the State of New

York but of the State of New Jersey, and that the husband had not appeared generally in the New York action.

He further found and stated in his opinion that:

8. based upon the papers before Judge Backer it was his opinion Judge Backer made an erroneous finding of general appearance, that there was no general appearance.

9. That Judge Klein who vacated the special appearance of the plaintiff, (Order of Klein, J. December 12, 1962, Page 2) did not thereby leave a general appearance as New York Judge Backer stated and determined (order of Backer, J. Jan. 11, 1963),

10. and that Judge Aurelio in his findings of fact and conclusions of law found incorrectly on the hearing, testimony, exhibits, facts, orders and papers before him and improperly included all the filed papers.

VIOLATION OF THE FOURTEENTH AMENDMENT BY THE RESTRAINTS

THE VALIDITY OF THE NEW JERSEY SEPTEMBER 21, 1962 RESTRAINT AND EVERY RESTRAINT OBTAINED THEREAFTER WAS LITIGATED IN NEW YORK BY THE HUSBAND COMPLAINANT WITH BOTH HIS NEW YORK AND NEW JERSEY ATTORNEYS PARTICIPATING THEREIN IN THE NEW YORK FORUM, and said restraints having been litigated cannot be relitigated in the local New Jersey action.

Corpus Juris Secundum Book 27B Section 330-331 Divorce states:

"Submission of issue of pendency of prior action. Where complainant submitted to the foreign court the question of whether the divorce proceeding brought therein should be stayed or dismissed because of the pendency of the local proceeding, the determination of that issue against complainant by the foreign court binding and complainant cannot relitigate that question in the local courts."

and the footnote thereto #58 cites Harrison v. Harrison, 133 A 2d 870, 183 Penna. Super 562.

It further goes on to say, at page 792:

> "and the fact that the foreign divorce court failed to give appropriate recognition to the local restraint does not relieve the local courts from the requirement of according full faith and credit to the foreign divorce decree and everything set forth therein."

THE COMPLAINANT HAVING APPEARED GENERALLY IN NEW YORK AND HAVING SUBMITTED TO THE NEW YORK COURT THROUGH BOTH HIS NEW YORK AND NEW JERSEY ATTORNEYS THE QUESTION OF WHETHER THE SEPARATION ACTION BROUGHT THEREIN SHOULD BE STAYED OR DISMISSED BECAUSE OF THE PENDENCY OF THE LOCAL NEW JERSEY CUSTODY PROCEEDING, the determination of that issue against complainant by the foreign New York Court is binding, and complainant cannot relitigate that question in the local New Jersey Courts two years later as Judge Concilio attempted to do; AND THE FACT THAT THE FOREIGN NEW YORK SEPARATION COURT FAILED TO GIVE APPROPRIATE RECOGNITION TO THE LOCAL RESTRAINT DOES NOT RELIEVE THE LOCAL NEW JERSEY COURTS FROM THE REQUIREMENT OF ACCORDING FULL FAITH AND CREDIT TO THE FOREIGN NEW YORK DECREE OF SEPARATION AND EVERYTHING SET FORTH THEREIN. (Corpus Juris Secundum).

In Harrison v. Harrison, 133 Atl. 2nd 870; 183 Pa. Super, 562, where the Court held once a restraint is litigated in the foreign court first it cannot be relitigated, at page 875, the Court said:

> "The Appellee having submitted to the *

Florida Court, the question of whether or not that proceeding should be stayed or dismissed because of appellant's pending Penna. divorce suit and that issue having been finally determined against her, Appellee cannot relitigate that question in the Pennsylvania Courts."

On the question of other things litigated in said action, i.e., general appearance, the same Court said, at page 814:

"The Appellee's contention that she did not enter a general appearance in the Florida divorce is not borne out by the record before us. She first filed a motion to stay and dismiss the Florida divorce action against her on the ground that there was a divorce action pending against her in Pennsylvania. This point she pursued through the Supreme Court of Florida.

"The Florida record which was annexed to the record by the Court below on the matter now before us proves she was in court...

"Unless a party strictly limits himself to the issue of the jurisdiction of the Court, which the appellee did not do, the decree of the Court is binding upon him in all respects. In Aquelina v. Doan, 1953, 374 Pa. 403; 409; 97 A.D. 2d 520, 522, Justice Chidsey said:

'Defendants chose not to confine themselves strictly to the issue of the jurisdiction of the court and in addition set up a defense on the merits. Under such circumstances the defendants

must be deemed to have by its determination of the legal questions involved: (citing)

"The facts in the present case are similar to those in Commonwealth ex rel Parker v. Parker, 1915, 59 Pa. Super 74. There the wife obtained a support order in Pennsylvania where both were domiciled; the husband went to Nevada where he filed for divorce. Though no personally served, the wife filed an answer asserting that herhusband was not a bona fide resident of Nevada and denying the charge in the bill; the Nevada Court granted the divorce. The husband then filed a petition in Penna. to set aside the support order because of the Nevada decree. The wife answered that Nevada never had jurisdiction over her and her court held that because the wife personally appeared in Nevada, the divorce decree was binding and entitled to full faith and credit quoting inter alia from Swecker v. Reynolds 1914, 246 Pa. 197; 92 A. 76, 77 as follows:

It is a result which obtains in most jurisdictions that any action on the part of the defendant except to object to the jurisdiction, recognizes the case as in Court, and amounts to a general appearance... It is obviously just and fair that if a party wishes to insist on the objection that he is not in Court, he must keep out for all purposes except to make that objection."

"The Supreme Court of Florida said, 71 So. 2d 731, with respect to its approving of the denial of the appellee's motion to stay;"

"So the petitioner found herself a liti-

gant in the Chancery Court in Florida over her protest."

"It thus held that by making the motion Appellee had submitted herself to Florida jurisdiction. This is in accord with the court's holding that a special appearance together with a motion to quash amounted to a general appearance. Gilhart v. Gilhart 1945, 155 Fla. 562."

The defendant thus argued not just a jurisdiction motion, but every motion then before the Court. (See Backer order "argued on the merits several motions"

When the defendant moved to vacate the order of sequestration he made a further general appearance.

The New York case of Ratkowsky v. Ratkowsky, (App. Div. 2nd Dept.) 272 App. Div. 775; 69 NYS 2d 573; decided on April 22, 1947 is exactly in point. The Appellate Division said:

"the acts of the defendant upon his motion to vacate the order of sequestration and to reargue that motion... in presenting affidavits ... were inconsistent with his claim, that his appearance was specialy only to question the jurisdiction of the Court.:

"Farmer v. National Life Ins. Assoc., 138 NY 265, 269, and 33 NE 10757; Henderson v. Henderson, 247 NY 428, 432, 160 NE 775, 777; Legler v. Legler, 224 App. Div. 55, 278 NYS 804; matter of Macauley, 27 Hun. 577, 578; Citizens Trust Co. of Utica v. R. Prescott and Son, Inc., 221 App. Div. 426, 431, 223 NYS 191, 196, 197."

The case at bar is even stronger. The holding of the Ratkowsky case is that a husband who moved in wife's separation action to vacate order of sequestration and to reargue that motion, and who presented affidavits and argued that the parties were living together, made a "general appearance" that gave the Court jurisdiction over him without personal service".

By participating in the merits and defending a motion for alimony and counsel fees and custody and by stating in his motion for reargument that the defendant refused to permit plaintiff to see the child, defendant argued the merits of the alimony, temporary custody and support motion and appeared generally.

The alimony, custody, support and counsel fees motion was submitted August 27, 1962 along with defendant's motion to dismiss for lack of jurisdiction. Submitted also the same day and hour and moment was the third motion by the Receiver to withdraw monies from sequestered funds. The decision on the said three motions.

In Teel v. Yost, 128 N.Y. 387, 28 N.E. 353, the Court held it established that where the defeated party deliberately tenders the jurisdictional fact controversy as a separate issue and loses thereon, he is not free to use the same assertion again as a defense to a suit on the judgment he had so contested (O'Donogue v. Boies, 159 NY 87, 53 NE 537).

There is no question left to be settled in New Jersey. In submitting to the jurisdiction of New York, defendant foreclosed himself from reopening the question of jurisdiction in New Jersey. The New York judgment is entitled to full faith and credit as a

matter of law.

In Sherrer v. Sherrer, 334 U.S. 343, 355, 92 L.ED. 1429 (1948), the Court stated, 334 U.S. at Page 351-352:*

> "We believe that the decision of this Court in the Davis case and those in related situations are clearly indicative of the result to be reached here. Those cases stand for the proposition that the requirements of full faith and credit bar a defendant from collaterally attacking a ... decree on jurisdictional grounds in courts of a sister state where there has been participation by the defendant in the divorce proceedings" (separation proceedings in the case at bar) "where the defendant has been accorded full opportunity to contest the jurisdictional issues and where the decree is not susceptible to such collateral attack in the Courts of the State which rendered the decree." *Also see Peff v. Peff, 2 N.J. 250.

Thus, New Jersey must give the same full faith and credit to the New York decree that would be extended to it in New York. Twice in New York in the separation action, the defendant husband litigated and relitigated the question of jurisdiction. The first time was before New York Supreme Court Judge Klein and the second before New York Supreme Court

Judge Chimera. (.. ~ .). The decision in New York of Judge Chimera on the motion wherein the defendant asked for relitigation of the question of jurisdiction was:

> "... the issues are res adjudicata (order of Klein, J., September 12, 1962)."

It is clear that the marital res of the parties hereto cannot be located both in New York and in New Jersey. If it is in New York the New Jersey State Court cannot relitigate jurisdiction. R. S. 2A:34-10. It is not intended on this motion to submit the question of jurisdiction or domicile to a revealing examination because it is unnecessary. The issue is disposed of by the final judgment of the New York Court set forth above.

Assuming for the sake of argument that the child was removed from New Jersey as Judge Concilio preferred to believe. The misapplicatioa of law by Judge Concilio represents a failure on the part of the Judge of the New Jersey Superior Court to subordinate the State's

legislative local policy and domestic law requirement of the United States Constitution. U.S. Const. Art. IV S c. 1. The highest Court of the land has enjoined such subordination and our courts have obeyed as has New Jersey. William v. North Carolina (first case), 317 U.S. 287, 63 S. Ct. 207, 87, L.Ed. 279 (1942); Peff v. Peff, supra, 2 N.J. at page 250; Brown v. Brown, supra 28 N.J. Super at pp. 170, 171. No less was required of the New Jersey Superior Court below.

Also as to the action for the replevin of the furniture, same was physically located in New York and had already been attached by the New York Receiver in sequestration. When the husband there moved to vacate the writ of sequestration he litigated jurisdiction of the res (furniture). The ownership of the furniture was disposed of in the final New York judgment. That is res adjudicata.

The New Jersey Superior Court decided the case at bar contrary to its own law.

The New Jersey Statutes further provide, N.J.S. A. 9:2-4:

> "..in no case shall the court having jurisdiction in this state over the person and custody of any minor permit.."

Edwards v. Edwards, 8 N.J. Super. at Page 550 said however that the power could not be exercised unless the court "has jurisdiction". And that court said that domicile of the child as opposed to his actual residence was at least an alternate ground for the court's decision in Pieretti v. Pieretti, 13 N.J. Misc. 98, 176 A 589 (1953) to determine the question of custody,

In the Joffe case, the New Jersey Custody Court had neither "actual residence" of the Joffe child who was living in New York nor

"domicile" which had already been litigated in New York. In Joffe, New York on the husband's challenge found the child domiciled in New York. New Jersey by finding a special appearance in New York (which precludes a further relitigation of jurisdiction) tacitly thus admitted the New York domicile. All parties admit the child was then resident in New York at the time of commencement of all actions. Thus, there is no basis upon which New Jersey may exercise the rights given to its citizens under NJSA 9:2-2 or 9;2-4.

Neither the Edwards or the Casteel cases are applicable to the case at bar. The New Jersey statute applied to the Casteel children because the wife had, prior to any litigation, by agreement given the custody of them to their father who resided with them in New Jersey. The formal separation agreement vested "sole custody and control" to the husband. The agreement was to be

incorporated in any divorce decree and it was, prior to the New Jersey custody fight. Not so in Joffe, where the child had been found to be a domiciliary (on challenge of the husband) and interim custody had already been given to the wife under Judge Flynn's order , prior to commencement of the New Jersey action based on the statute which qualifies the right to sue under the statute to "when the Superior Court has jurisdiction".

The Casteel case agrees with this brief. It quoted the May case saying:

> "The jurisdictional determination in the May case is not important in the case at hand since the present defendant had submitted to the jurisdiction of the Nevada court." (As did Joffe in New York).

In Edwards (supra.) the wife left New Jersey (the only residence of the parents during the marriage), took the children West and attempted to establish a "pretended

with the husband's consent lived throughout the marriage in New York and New Jersey and the husband had already litigated domicile of the child and lost. Thus the New Jersey statute voicing local policy limits its own applicability in New Jersey to children over which the State of New Jersey already has jurisdiction. New York already has jurisdiction, of the Joffe child adjudicated on the husband's challenge, in addition to which the child was physically present and resident in New York and an order of custody had already attached it. In the Salmon case 88 N.J. Super 302 the husband was never served in Nevada and took no part in the ex parte proceedings. (Not so, Joffe).

Fantony v. Fantony, 31 N.J. Super. 14 held that mere presence of an infant within the state has been held sufficient to give a Court jurisdiction of its custody, subject to the qualification by Chief Justice Cardozo in Finlay v. Finlay, 24 N.Y. 429, 148 N.E. 624,

ARGUMENT ON FULL FAITH AND CREDIT, RES ADJUDICATA AND LACK OF JURISDICTION OF THE NEW JERSEY COURT.

You thus have two conflicting orders to two States under the Federal Constitution.

THE NEW JERSEY RESTRAINT WAS ILLEGAL FROM ITS INCEPTION AND IT WAS LITIGATED IN THE NEW YORK COURTS WITH ALL PARTIES PARTICIPATING.

The decision of Judge Concilio totally failed to recite the fact that prior to the issuance of the September 21, 1962 restraint against the plaintiff wife (restraining her from proceeding in New York) said Judge had issued a restraint against the husband from proceeding in the State of New Jersey dated September 20, 1962. He failed to state that without knowledge or notice and without a hearing on that restraint it was wiped out in an ex parte proceeding between him and the attorney for the defendant and a new restraint - the illegal restraint of September 21st was issued. The circumstances of this affront to due process was attempted to be explained

in New York by J. Mortimer Rubenstein, Esq., New Jersey counsel for the husband defendant when said counsel interposed an affidavit in New York on the husband's New York motion to stay the wife - a litigated motion which litigated the legality of the September 21st, 1962 restraint, two and a half years prior to its relitigation in New Jersey.

(The requesting in the New York suit of this affirmative relief by the husband incidently constituted a further general appearance in the New York action, giving New York in personam jurisdiction of the husband regardless of the fact that he was a New York domiciliary and Judge Concilio's findings of domicile in New Jersey). Regardless of all else, therefore, Judge Concilio was required to give res adjudicata effect to the New York proceeding.

In opposing the husband's application for restraint against her, the wife duly pointed

out and emphasized the prior existence of the decree of New York Supreme Court adjudicating valid process and jurisdiction and restraining him (the husband) from proceeding. That because the wife was in dire need of money for her sick and handicapped child and to prevent foreclosure of valuable real estate owned by the entirety by her husband and herself on which he refused to pay mortgage and taxes, the receiverso ordered by the court proceeded in New York besause New York in a contested proceeding had already adjudicated her a New York domiciliary on her husband's jurisdiction challenge decided September 12, 1962 long prior to issuance of any New Jersey restraint. It was appellant's firm conviction as a New York attorney, which is her profession, that New Jersey would never find her in contempt for proceeding (in a State of which she was adjudicated a domiciliary) to seek relief under the law of the said State. This she based upon the New Jersey case of

Lawrence v. Lawrence and Brown v. Brown cited hereinabove, and depended on the United States Constitution.

THE RE-LITIGATION

The original writ has Chronology of the double litigation as it proceeded in two States with New Jersey relitigating each and every issue between the same parties 2½ years later.

A review of the various litigated New York motions, the orders of the various judges will show that not only did New York Supreme Court Judge Aurelio find that the husband had submitted to the jurisdiction and contested the action in New York, but he also at final hearing went on further and found that not only was the husband a domiciliary at the time of filing suit, but continued to be a domiciliary down to the entry of Judgement, (December 3, 1963).

It is to be noted appellant's contention is that the New York judgment is res adjudicata entitled to full faith and credit, and the

husband's only remedy was by way of appeal in the New York Appellate Division from the New York Supreme Couirt Judgment. This he stated to do, but then he withdrew. The Court of New Jersey cannot substitute its judgments of findings of fact as against the findings of fact of the New York Court where he appeared generally, contested the merits of jurisdiction, and the Court found it to be a fact; The duty of the plaintiff husband was to appeal to the Appellate Division of New York and the husband may not run to New Jersey and have the New Jersey Superior Court review the final judgment and all the interim orders of the New York Court.

As hereinafter noted the appellant at every turn moved to dismiss on the ground:

The New Jersey Court had no jurisdiction to entertain the New Jersey suits because:

1) That Court was obliged to give full faith and credit to the final judgment of New York Supreme Court Judge Thomas

A. Aurelio entered in the case of Gussie Joffe, Defendant v. Sidney Joffe, Plaintiff, which suit was filed in the Supreme Court of the State of New York, County of New York, June 23, 1962.

2) The final judgment of separation entered in the New York action betwen the parties in a contested proceeding with all parties before the Court was res adjudicata.

3) The New Jersey Court was without jurisdiction to try, hear and determine the issue presented to that Court in the suit entitled Joffe v. Joffe, filed August 17, 1962, custody, replevin and injunction action as well as the divorce action.

4) That the rule of comity required that the New York action, having been filed prior to time to the New Jersey action, is entitled to priority of determination, and for the further reason that the issue and parties in both Courts are the same, and the New York judgment having been

rendered by a Court of competent jurisdiction in an action in which both defendant and plaintiff participated and submitted to the jurisdiction of the New York Court, the New Jersey Court should not have intervened and the New Jersey action should have been dismissed.

5) The child and furniture were at all times physically present in New York, and New Jersey had no jurisdiction of the subject matter.

On the question of full faith and credit under the United States Constitution, Article IV, the law is clear that New Jersey will extend the same full faith and credit to the decree of a sister state, that that state will extend to decrees of other states. However, in the case at bar in New Jersey, we have not only an appearance and contest on the issue of jurisdiction, but a finding of general appearance. The case in point in New York are exactly on all fours is Matthews v. Matthews, supra. Added to this is the finding in the

final New York decree of domicile from the inception. Any one of these three points is sufficient to require full faith and credit and sufficient to support an impersonam decree under the facts herein. In the case at bar you have all three points.

RAISING THE FEDERAL QUESTION

The New Jersey complaint alleged the Statute as the basis of jurisdiction and the statute pursuant to which the action was brought.

The Federal question was rasied some 20 days after service of summons and complaint by motion to dismiss on constitutional and jurisdictional grounds.

The Court carried the motion 2½ years during which the Petitioner moved to vacate restraints imposed on the same Constitutional grounds. At the hearing on jurisdiction held by the Court, as it stated, pursuant to the illegal statute the appellant again moved to dismiss on constitutional grounds that the statute being illegal drew in issue and violated the full faith and credit and due process clause of the constitution. The Court denied the motion and precisely quoting the illegal statute determined that said statute gave it jurisdiction to entertain the custody suit,

entertain the restraints, enforce the restraints and enter the contempt judgments for failure to abide by said restraints and deny full faith and credit, equal rights and privileges to petitioner and infant.

During the custody trial at the end of the plaintiff's case appellant moved to dismiss on Constitutional grounds, and that being denied, at the end of the defendant's case appellant moved to dismiss on constitutional grounds specifically stating that the Statute violated the Article 4 and the 8th and 14th amendments.

Thus, the federal question was raised and petitioner claimed the statute deprived her of Constitutional rights on reargument in the Supreme Court of New Jersey, in the Appellate Division brief and in the Superior Court on the motion to dismiss the complaint and the motion to vacate the restraints and the motion to stay the contempt hearings. In the Appellate Division it was first raised on the

Appellant's motion to stay the trial of the custody action until the contempt orders were completed through appellate process. It was further raised in the Superior Court when appellant moved for immunity from the contempt arrests for the purpose of entering the State of New Jersey to testify in the custody action, in which the contempts had been entered before trial. It was refused there and in the Appellate Division and immunity was finally granted in the Supreme Court of New Jersey, only after certiorari was granted on the appeal from the contempt judgments, the fourth year of the custody trial (said case has been on trial six years with all stays in effect, all restraints in effect and without adequate support to the child).

In the Appellate Courts the Constitutionality question was repeatedly raised and in motions to stay execution of the contempts in every appellate court and in motions to stay the custody trial until the constitutionality

question should be decided.

In the Supreme Court of New Jersey the briefs cited the Constitutional question and on reargument in the Supreme Court amplified full faith and credit and deprivation of civil rights, due process and equal rights and immunities, deprivation of liberty and property without due process. The notice of appeal from the Supreme Court of New Jersey specifically quoted the statute and alleged the unconstitutionality. It is requested that the petition for writ of certiorari be treated as a jurisdictional statement and this petition a request for reargument thereof.

PRESENTATION OF GROUNDS ON WHICH IT IS CONTENDED THE APPEAL IS OF A SUBSTANTIAL NATURE, OR FOR ALLOWANCE OF THE WRIT.

The questions involved herein are of a substantial nature. It is well established that an appeal will not be dismissed for want of a substantial federal question, unless the contentions of the appellant are "clearly not debatable and utterly lacking in merit." Hamilton v. Regents of University of California, 293 U.S. 245, 258.

The issue raised by the appellant's contention that the New Jersey Statute here in question violates the "equal protection clause of Section 1 of the Fourteenth Amendment to the United States Constitution involes the problem of discrimination. Children born in New Jersey or residing there 5 years cannot be afforded parens patriae protection by other states in which they may be found or residing as can the children, citizens of other states. Their judgments may not be given full faith and credit as was not the Joffe

child's. They can have no other domicile then that of New Jersey and New Jersey is their only appellate court in the United States where their judgments may be reviewed. This is discriminatory against any child unfortunate enough to be born or reside in New Jersey 5 years. They are deprived of full faith and credit given other children under Article IV - as was the Joffe child. They are deprived of finality of litigation (Durfee v. Duke) as applies to questions of jurisdiction (per Durfee). They can never be domiciled in any other State as could not the Joffe Child. Although New York Law states that an abandoned wife may establish a domicile in New York with her children, New Jersey refuses to recognize this.

The purpose of the New Jersey Statute is to protect children. The clause forbidding removal of the child from the state has

nothing to do with the purpose of the statute as used in Joffe. It is arbitrary and unreasonable in that it does not protect the child and has nothing to do with the promulgated purpose of the statute.

The question thus raised by this statute has never been expressly or impliedly reviewed by the Supreme Court of the United States. For the person involved - any child born in New Jersey whose parents must leave the State to work in another State where they are licensed in order to support the child abandoned by the father - the appeal presents a substantial Federal question open to any parent leaving the state to go with children where children can be supported either by grandparents or jobs in other States. Must they first go to court?

The issues raised by appellant that the New Jersey statute is repugnant to Article Iv and the Fourth and Fourteenth Amendments of the Constitution have also

never been reviewed by the Supreme Court. The New Jersey Statute limits the ability of citizens to travel freely from one State to another. They are deprived of liberty without due process in that the child cannot remain in New York where he was adjudicated a domiciliary and being nurtured or live therein, but must be returned to New Jersey. This is without any court adjudication, but by statute, whereas the infant had a Court adjudication in New York giving it the right to live where it is being supported - by its mother licensed and working in New York. It is deprived of her support plus the adjudicated father support in New York and must take $35 weekly support only, given by New Jersey's Court without taking testimony or due process of any kind for six years. It is deprived of liberty and property without due process because New Jersey under the above statute refuses recognition to the New York order giving the child

use of a home, the weekly support from its father to be taken from sequestration funds. Likewise the mother is deprived of her rights under the New York judgment and told to vacate the same or go to jail - which is deprivation of property and liberty without due process of law - to say nothing of deprivation of custody of her infant child without due process or the advantage of the appellate process of the State of New York. A case on trial six years without a properly adjudicated court award is lack of due process.

Furthermore the appeal upon the grounds presented in the writ - full faith and credit the determination of which is important to any mother or child unfortunate enough to be born in New Jersey or reside there five years and the deprivation of full faith and credit such as had been practiced in the case at bar is important to any child whose mother is separated and residing in another state with the child where her husband had abandoned them and returned to New Jersey. Such mother and

child can never to domiciled elsewhere or have their marital and property rights adjudicated under the law of the State in which they may be found or may be living. The statute affects to transfer jurisdiction of any law suit pending in any state of the union to the State of New Jersey for original jurisdiction or appellate jurisdiction. It frees the state of New Jersey from any fedders of the United States Constitution.

Any adjudication of any other state pertinent to a wife and child will be in doubt whether or not a husband appears in that other state, in accordance with the laws of the state, submits to its jurisdiction and no adjudication of that other state can ever be effective in the State of New Jersey. Any adjudication of divorce, separation or marital status of husband and wife unfortunate enough to have a child born in New Jersey will be in doubt as will the status of their marriage and their property rights adjudicated in that other state. Only a decision by the Supreme

Court of the United States in this cause will remove this grave uncertainty by deciding to what extent the enactment of the here relevant section has rendered inoperative judgments of other states on the same subject matter or marriage.

Petitioner respectfully shows to the Court that this is a case of great importance to petitioner and any wife, member of the general public who should happen to have a child born in a New Jersey hospital or an auxiliary home either at a vacation point in the lakes along the Atlantic Ocean, the South Jersey Shore, Points of Atlantic City, Drehl Asbury Park or at any point where any child resided for a period of five years in the State of New Jersey, though it be physically present in another State of the Union or have its permanent home and/or domicile in any other State, or theyumove outside of the State.

If the statute is allowed to stand or the decision as the statute has been interperted

and implemented by this case, New Jersey need never give full faith and credit to any judgment of divorce or separation from any other state if the parties thereto have or ever had a child born in New Jersey or residing in New Jersey for a period of five years. In addition, it will permit an entire relitigation of all of the matrimonial and jurisdictional issues decided by the parties in a contested action in any other state of theunion and completely deprives the litigants of any finality of litigation or full faith and credit under the United States Constitution, will lead to a multitudinous multiplicity of matrimonial suits and result in further constitutionality deprivations to wives and children in other states completely depriving them of any support of permanent residence during minority.

The exact questions at bar in the matter of full faith and credit and the right of finality of litigation has been definitely settled and passed upon by this Honorable

Court and the identical questions now submitted to the court have been passed upon by the courts of last resort of various states even New Jersey and the United States Supreme Court and in every instance the opinion of these courts have upheld the contention now made by your petitioner. A few of the cases are:

Durfee v. Duke, 375 U.S. 106

Davis v. Davis, 305 US 32, 83 L.Ed. 26 (1938)

Baldwin v. Ohio Travelling Men's Assoc. 283 U.S. 522,

Halvey v. Halvey 330 U.S. 610
Estin v. Estin, 334 U.S. 541

Vanderbilt v. Vanderbilt, 77 Sup. Ct. 1360

Finlay v. Finlay, 240 NY 429, 148 N.E. 624, 40 A.L.R. 937 (1925)

It is respectfully submitted by petitioner that it is necessary that this honorable court settle the question, not only on account of its importance, but also on account of the fact that the decision of the Supreme Court ofNew Jersey conflicts with the decisions of so many other Courts of last resort and most particularly numerous decisions of this Supreme Court of the United States, repeatedly recited.

THERE HAS BEEN A SUPERVENING SUPREME COURT OF THE UNITED STATES DECISION WHICH REQUIRES THAT THIS COURT TAKE JURISDICTION.

Judge Concilio relitigated jurisdiction and entered his opinion August 24, 1964. On December 23, 1964 the Supreme Court of the United States in Durfee v. Duke, 375 U.S 106 definitely settled the question and held that once the parties have had their day in court, and litigated the question of jurisdiction, they are bound thereby, that one litigation of an issue is enough.

Further, although the case of Townsend v. Sain 372 U.S. 293 holds that the appellant is entitled to a full hearing on the question of contempts and the court must remand same for full hearing, this the Supreme Court of the State of New Jersey refused to do. Although the Appellant rested on the Federal and jurisdic-

tional question throughout and never had full hearing on the question of wilfullness etc.; the Supreme Court on reargument refused to consider the issue, did exactly what Durfee v. Duke forbids. New Jersey Judge Concilio after investigating jurisdiction on the appellant's motion to dismiss the custody complaint found that appellee husband had entered a special appearance in the New York separation action. Judge Concilio specifically found that the appearance was entered for the purpose of litigating jurisdiction of the subject matter and his person pursuant to New York Statute (237a) designed for that purpose. Judge Concilio agreed that New York had issued an order after litigation of that issue finding jurisdiction and domicil in New York. However Judge Concilio then went beyond the permissible scope of inquiry as permitted by Durfee. After finding juris-

diction had been litigated in New York he relitigated that question in New Jersey, took testimony of respondent while appellant rested on the New York decree. Judge Concilio sat as an appellate court to Judges Klein,Backer and Aurelio of the New York Supreme Court and disagreed with New York's finding that respondent had entered a general appearance and that New York had jurisdiction of the subject matter, marital res and child and person of respondent. Finding jurisdiction in New Jersey to entertain the custody case, Judge Concilio then found jurisdiction to enter restraints and punish for violation thereof. Further, although the restraints and their legality and validity and efficacy were previously litigated in New York by respondent (after losing his jurisdiction motion) the Judge proceeded to relitigate the validity and efficacy thereof and

gave them efficacy where New York 2½ years prior had denied it.

The New Jersey Superior Court proceeded to do just what the Supreme Court of the United States forbids in Durfee. It decided the Appellate question exactly opposity to the Supreme Court of the United States and held that Judge Concilio properly relitigated jurisdiction to arrive at a finding of domicile of an absent child which domicile conferred jurisdiction on the court to issue restraints. It sustained Judge JConcilio's finding that NJSA 9:2-2 applying to "native" children gave him authority to determine the Nativity or domicile of the parents and thus the absent child-ignoring the New York final judgment that the child "since birth" was domiciled in the State of New York.

The New Jersey Supreme Court violated Durfee in sustaining the appellate

division finding that there was nothing in the record to show that New York had jurisdiction prior to the appellant being served in New Jersey. It held that the contempt orders entered for violation of restraints imposed in a custody action of an absent child were properly entered in the custody action wherein jurisdiction was heard and determined the issue of custody, was conferred on the court by a statute which was used to illegally relitigate jurisdiction - all contrary to the Fourth Amendment requiring New Jersey to give full faith and credit to the New York judgments and decrees.

The Supreme Court of New Jersey decided the case not in accord with its own decisions. It also had decided the question not in accord with the applicable decisions of its own courts in Gerard v. Distefano, 84 NJ Super 396 (1964); Hudson v. Hudson, 36 N.J. 549 (1961).

THE SUPREME COURT OF NEW JERSEY HAS DECIDED THE CASE NOT IN ACCORD WITH THE APPLICABLE DECISIONS.

The attention of this Court is respectfully directed to the landmark case of Durfee v. Duke (375 U.S. 106, 11 L . Ed. 2d 186, 84 S. Ct. 242, December 23, 1963) which constitutes the latest decision of the United States Supreme Court reviewing the e tire history of matrimonial decision, finally settling once and for all the facts that jurisdiction once litigated between the parties, can never be relitigated.

On page 192 thereof the Court said:

> "The constitutional command of full faith and credit, as implemented by Congress, requires that "judicial proceedings ... shall have the same full faith and credit in every court within the United States ... from which they are taken". Full faith and credit thus generally requires every State to give to a judgment at least the res judicata effect which the judgment would be accorded in the State which rendered it. "By the Constitutional provision for full faith and credit, the local doctrines of res adjudicata, speaking generally become a part of national jurisprudence, and there-

fore federal questions cognizable here." Riley v. New York Trust Co. 315 U.S. 343, 349, 86 L. Ed. 885, 891, 62 S Ct. 608."

"However, while it is established that a court in one State, when asked to give effect to the judgment of a court in another State, may constitutionally inquire into the foreign court's jurisdiction to render that judgment, the modern decisions of this Court have carefully declined the permissible scope of such an inquiry. From these decisions there emerges the general rule that a judgment is entitled to full faith and credit - even as to questions of jurisdiction - when the second court's inquiry discloses that those questions have been fully andfairly litigated and finally decided in the court which rendered the original judgment.

With respect to questions of jurisdiction over the person, this principle was unambiguously established in Baldwin v. Iowa State Traveling Men's Assn., 283 US 522, 75 L ed 1244, 51 S Ct 517. There it was held that a federal court in Iowa must give binding effect to the judgment of a federal court in Missouri despite the claim that the original court did not have jurisdiction over the defendant's person, once it was shown to the Court in Iowa that that question had been fully litigated in the Missouri forum. "Public policy", said the Court, "dictates that there be an ed of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as betwen the parties. We see no reason why this doctrine should not apply in every case where one voluntarily appears, presents his case and is fully heard, and why he should not, in the absence of fraud, be thereafter concluded

by the judgment of the tribunal to which he has submitted his cause." 283 US, at 525-526, 75 L ed at 1247.

Following the Baldwin case, this Court soon made clear in a series of decisions that the general rule is no different when the claim is made that the original forum did not have jurisdiction over the subject matter. Davis v. Davis, 305 US 32, 83 L ed 26, 59 S Ct 3, 118 ALR 1518; Stoll v. Gottlieb, 305 US 165, 83 L ed 194 59 S Ct 134; Treinies v. Sunshine Mining Co. 308 US 66 84 L ed 85 60 S Ct 44; Sherrer v. Sherrer, 334 US 343 92 L ed 1429, 68 S Ct 1087, 1 LAR 2d 1355. In each of these cases the claim was made that a court, when asked to enforce the judgment of another forum, was free to retry the question of that forum's jurisdiction over the subject matter. In each case this Court held that since the question of subject matter jurisdiction had been fully litigated in the original forum, the issue could not be retried in a subsequent action between the parties.

In the Davis case it was held that the courts of the District of Columbia were required to give full faith and credit to a decree of absolute divorce rendered in Virginia, despite the claim that the Virginia court had lacked jurisdiction because the plaintiff in the Virginia proceedings had not been domiciled in that State. In the course of the opinion the Court stated:

> 'As to petitioner's domicil for divorce and his standing to invoke jurisdiction of the Virginia court, its finding that he was a bona fide resident of that State for the required time is binding upon respon-

> dent in the courts of the District. She may not say that he was not entitled to sue for divorce in the state court, for she appeared there and by plea put in issue his allegation as to domicil, introduced evidence to show it false, took exceptions to the commissioner's report, and sought to have the court sustain them and uphold her plea. Plainly, the determination of the decree upon that point is effective for all purposes in this litigation.' 305 US, at 40, 83 L ed at 29, 118 ALR at 1521.

This doctrine of jurisdictional finality was applied even more unequivocally in Treinies, supra. In Treinies, the rule was succinctly stated: "One trial of an issue is enought. "The principles of res judicata apply to questions of jurisdiction as well as to other issues,' as well as to jurisdiction of the subject matter as of the parties." 308 US, at 78, 84 L ed at 93.

The reasons for such a rule are apparent. In the words of the Court's opinion in Stoll v. Gottlieb, supra, "We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation.. Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to

present his evidence..a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue . There is no reason to expect that the second decision will be more satisfactory than the first." 305 US at 1721,83 L ed at 109.

It is submitted the New Jersey Joffe decision is diametrically the opposite of the holding of the Durfee case.

3. THE COURTS OF NE# JERSEY HAVE DECIDED THE CASE NOT IN ACCORD WITH ITS OWN APPLICABLE DECISIONS, of Gerard v. De Stefano, 84 N.J.Super 396 (1964) and Hudson v. Hudson 35 NJ 549 ((1961)

In Gerard v. Distefano, supra the Supreme Court of New Jersey held that Under the Article Iv of the United States constitution due process means that:

"Under the full faith and credit clause the attack cannot be made..in a sister state by one of the parties to the decree in the granting State where both parties have appeared."

In quoting the Williams v. North Carolina case supra..the court said:

> "'When a divorce cannot be attacked for lack of jurisdiction by parties actually before the court..in the rendering state, it cannot be attacked by them anywhere.'"

4. THE APPELLATE DIVISION OF THE SUPERIOR COURT OF NEW JERSEY HAS DECIDED THE CASE NOT IN ACCORD WITH ITS OWN PREVIOUS DECISIONS.

The leading case in New Jersey on whether or not a non-domiciliary may be held in contempt for proceeding in the face of a restraint in a matrimonial action is Lawrence v. Lawrence, supra. While Brown v. Brown, supra in the Appellate Division of Superior Court, New Jersey, held that one must go to the appellate division prior to proceeding in the face of a restraint to ascertain whether the order was legal - Lawrence case held that the one exception to the general rule of Brown v. Brown was where the court issuing the order had no jurisdiction.

The decision of the Appellate Division which the New Jersey Supreme Court affirmed said:

> "There is nothing in the record to establish that at the time the Chancery Division action was commenced, the New York Court had personal jurisdiction over the plaintiff or the marital res."

In the record before this Court and before the Appellate Division and Judge Concilio is the decision of New York Supreme Court Judge Backer wherein he lists all of the things defendant did in New York to effect a general appearance, which says in the dispositive section (

Defendants' Notice of Motion to vacate service of process dated August 15, 1962 together with affidavits of Sidney H.

> Joffe sworn to August 14, 1962 with exhibits questioning jurisdiction of the person and subject matter."

> "All of the appearances of defendant's counsel labelled "special" or otherwise and all of the extensions of time, arguments and reargruments of motions heretofore had herein, and all other papers, exhibits, supporting papers and the following..."

Judge Backer thus said that defendant from the first motion (August 14, 1967) to vacate and adjournment prior thereto July 22 defendant appeared generally. The August 22nd affidavit referred to by Judge Backer and which was before Judge Concilio (see page 239 of Judge Concilio's opinion) said: of that affidavit where in the New York defendant doctor said:

> "I cannot, however, permit to go unchallenged plaintiff's statements concer ing my alleged difficulties with Internal Revenue.. It had no connection with the merits of the jurisdiction. Plaintiff's statements concerning this aspect is a deliberate falsification of fact."

In speaking of an affidavit he signed in

1959 wherein he claimed to be a resident of New York he said:

> "I assumed my signature.. necessary in order to start the action. This is the nature of my sworn testimony that I was a New York resident in 1959".

Also on August 22nd he said: (in an affidavit) which was addressed to a motion not of jurisdiction but to withdraw monies from sequestered funds:

> "I cannot at this time meet some of the issues created by the plaintiff without avoiding a general appearance and I ask the Court to take this factor into consideration.. However I am advised the plaintiff has made the necessary payments to the bank so that there is no danger of foreclosure."

Although he stated he did not want to argue the merits that is just what he did, and Judge Backer so found. Judge Backer's order is part of the record and refer to the affidavits of August 14 and 22nd that constituted general appearance.

THE NEW JERSEY COURT COULD NOT GO BEHIND JUDGE BACKER'S ORDER OR JUDGE AURELIO'S judgment. All it may do is see if there was a

special appearance to argue jurisdiction. Judge Klein's order, Appendix proves this. Once it has ascertained that it must accept the decision of the court in which the challenger asked the decision. The landmark decision of Durfee v. Duke says that once a court has ascertained a person made a special appearance to contest jurisdiction and it was decided against him, he is bound by that decision and is precluded from ever going to any other state of the United States to relitigate it right or wrong. His only appeal lies to the Appellate Division of the state which rendered it. The Supreme Court in the Durfee case cited as its authority a New York case and the New Jersey Case of Davis V. Davis which went all the way up to the Supreme Court of the United States.

Thus, appellee having asked New York to determine jurisdiction by his motion August 14, he is bound by that determination for

which he asked because in asking he submitted himself to the New York decision. The date of asking was August 14 (to say nothing of his general appearance July 22, 1962 as Judge Backer says). The appellant was not served until August 23, 1962 when she entered New Jersey.

Further Judge Flynn's order attached the child in New York and gave the mother interim custody. The father had appeared and submitted to a jurisdictional decision August 14 and 15th. There was nothing left for New Jersey when the wife was served there because New York had full jurisdiction to decide all of the issues, and had been asked by the husband to decide jurisdiction.

The case in New York which clearly spells out when a special appearance becomes a "general appearance" is Matthews v. Matthews, supra.

THE SUPREME COURT OF NEW JERSEY PERMITTED RELITIGATION OF THE QUESTION OF DOMICILE IN A CASE FOR CUSTODY OF A CHILD CONTRARY TO THE COURT OF APPEALS OF NEW YORK HOLDING IN FINLAY v. FINLAY

The Supreme Court has held that parents cannot adjuciate their rights in a custody proceeding. In Finlay v. Finlay 240 NY 429 148 N.E. 624, 40 ALR 937 (1925) Judge Cardozo in a majority opinion for the Court held that a custody action:

> "may not be used as a pretense for the adjudication of the status of parents whose domicile is elsewhere nor for the definition of parental rights dependent on status.. parents so situated must settle their controversies at home.."

Since New York had already adjudicated the domicile and since custody had been decided in New York, the relitigation of domicile of the parents in the custody action, could not be done in the face of the Supreme Court holding thereon.

THE ACTION HEREIN SHOULD HAVE BEEN DISMISSED BECAUSE THE SUPREME COURT OF NEW YORK HAS HELD THAT CUSTODY OF A CHILD IN THE ABSENCE OF A PENDING MATRIMONIAL ACTION,

> such as divorce or separation action or action for maintenance of separate maintenance must be adjudicated, only by way of writ of habeas corpus or petition to the chancellor or whatever court has taken place of the chancery.

In Halvey v. Halvey quoting Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 625, 40 ALR 977, the Supreme Court of the United States sustained a decision wherein the Court dismissed a father's "action for custody" brought by way of complaint for custody on the ground that it was the wrong remedy, and that the presence of the child or residence of the child in the state could not be used to adjudicate parental rights. The lower Court held that custody could only be adjudicated upon a proceeding commenced by writ or petition, and not a Supreme Court action. The New Jersey Superior Court has done exactly what the Supreme Court of the United States has held cannot be done.

A copy of the opinion of Judge Conciliio is appended in the original index to the original writ and the deleted portions printed and appended hereto as Appendix
A copy of the decrees appealed from is appended to the original writ as Appendix

Therefore the appellant Gussie Joffe respectfully submits that the Supreme Court of the United States has jurisdiction of this appeal by virtue of Section 344 (a) of Title 28 of the United States Code, or Section 1257 (3).

CONCLUSION

For these various reasons the writ of certiorari should issue or in the alternative the writ should be treated as a jurisdictional statement based upon the motion for rehearing herein, and the Judg-

ments below should be reviewed by this Honorable Court.

Respectfully submitted,

F.JOSEPH DONAHUE
Attorney for Petitioner
503 D Street, N.W.
Washington, D.C. 20001.

CERTIFICATION OF COUNSEL

I hereby certify that the aforegoing petition is submitted in good faith and not for purpose of delay, and is limited to the reasons set forth in Rule 58:2.

Dated: May 20, 1968.

F. JOSEPH DONAHUE
Attorney for Defendant-Petitioner Gussie Joffe
503 D Street, N.W.
Washington, D.C. 20001.

Portions of September 24, 1962 opinion of New Jersey Superior Court Judge Vito A. Concilio which appear to have been omitted from Appendix B of original petition for writ(heretofore filed) and which goes after B6 and before B-11 thereof. (Designated B 7a to j herein)

"It is inescapable from the evidence presented by the plaintiff that he has sustained the burden of proof cast upon him and that at the time of the commencement of this action he had been and still is a resident and domiciled in the State of New Jersey. The Court further finds that the infant child of the parties was also domiciled in this State until defendant removed him to New York.

II

The next question to determine is whether this Court has jurisdiction to decide the issue of custody.

N.J.S.9:2-3 provides; "When the parents of minor childrenalive separately***, the Superior Court, upon complaint of either parent shall have l power to make judgments or orders concerning their ** custody,**concerning children whose parents who are divorced***.

This power cannot be exercised unless the Court has jurisdiction.

The case of Edwards v. Edwards reported in 8 N.J.Super.page 547 (Super.Ct.1950) appears to be a case in point with the one presently before this court. In that matter the plaintiff husband and defendant wife, a native of California where her family still resides, were married in San Francisco in 1939. In 1942, they established their home in Glen Rock,New Jersey, and are the parents of three children. In November ,

1949, Mrs. Edwards, taking with her the children, left her husband and went to California, and she and the three children reside in the City of Santa Barbara, in that State. Defendant on December 22 1949, commenced in the Superior Court of California, an action for separate maintenance, division of community property, custody and support of the children, against the plaintiff. The papers in this action together with an order to show cause relating to suppprt, maintenance, counsel fees pendente lite, were served upon the plaintiff in New Jersey. Meanwhile the plalntiff had commenced an action in this Court for custody of the children, and for other relief. Plaintiff obtained personal service in California on the wife. She moved for an order dismissing the complaint on the grounds that **the court lacked jurisdiction over the subject matter in that defendant and the children

do not reside in New Jersey***

Judge Hagarty in his decision points out that: "The state of domicile of the child can change the custody of the child from one parent to the other or to or from both." Restatement, Conflict of Laws S145, and see section 117. Domicil of the child as opposed to his actual residence is at aleast an alternate ground for the Court's decision in Pieretti v. Pieretti, 13 N.J.Misc.98, 176 A.589 (1935) to determine the question of custody. See In re Williams, 77 N.J. Eq. 478, 482, 77 A. 350, 353 (1910); Heard v. Heard, 323 Mass.357, 82 N.E. 2d 219 (1948). Conley v. Conley, 324 Mass. 530, 87 N.E.2d 153 (1949).

The question thus becomes -- where is the children's domicil? It is stated in the Restatement, Conflict

OF Laws, s30, that: "***a minor child has the same domicil as that of its father." Also, Pieretti v. Pieretti, 13 N.J.Misc.98,102, 176 A.589 (1935); see Rinaldi v. Rinaldi, 94 N.J.Eq.14,118 A.685 (1922). A though it may be admitted that the mother can establish a separate domicil, Shepherd v. Ward, 7 N.J.Super. 130 (1950) and it may be assumed arguendo that she has done so, the fact that the c children live with her cannot be said to change their domicil save where, for example, the parents are divorced or judicially separated. Restatement, Conflict of Laws, S32. Defendant argues further that the child's domicil is that of the mother, if the mother has been justified in leaving the father. Whether or not that is correct, it cannot be determined at this stage when the question of the defendant's cause or reason in leaving

the plaintiff is viogrously contested. Therefore, I conclude that this court has jurisdiction to decide the question of custody.¥"

"See also Fantony v. Fantony, 31 N.J. Super 14, (Super Ct. A.D.1954) Aff'd and modified 21 N.J.525, (Sup.Ct.1956) Judge Freund who wrote the opinion in the Appellate Division concisely stated:

"Vice-Chancellor Howell stated in In re Williams, 77 N.J.Eq.478(Ch.1910);

"' I see no reason in the nature of things why this court, by virtue of its general jurisdiction over infants, does not acquire the same authority and control over the care and custody of infants who are actually resident in this state as it does over infants who are actually domiciled here.¥"

"Under general equity jurisdiction for the protection of the incompetent or helpless

the mere presence of an infant within the State has been held sufficient to give a court jurisdiction of its custody: In re Erving 109 N.J.Eq.294 (Ch.1931); Hachez v. Hachez, supra. In re Olcott,141 N.J.Eq 8(Ch.1947); In re Smith...This rule is subject to the qualification stated by Chief Justice Cardozo in Finlay v. Finlay, 240 N.Y.429, 148 N.E.624,40 A.L.R.937 (Ct.App.1925),quoted many times in this and other jurisdictions: "The residence of the child may not be used as a pretense for the adjudication of the status of parents whose domicile is elsewhere,nor for the definition of parental rights dependent upon status.***Parents so situated must settle their controversies at home. Our courts will hold aloof when intervention is unnecessary for the welfare of the child."

"The position of the State of New Jersey

concerning the public policy of the State of New Jersey to determine the custody of minor children native to and resident of as well as domiciled in New Jersey all their lives prior to be ing removed to another State by one of the parents is clearly set forth by Judge Conford, speaking for the Appellate Division in Casteel v. Casteel, 45 N.J.Super 338, on pg.352 (Super A.D.1957), as follows:

> "' The Statutory expression of New Jersey's policy concerning the removal of minor children of divorced parents or separated parents from this State dates from L.1902, c.92 and is now found in the following provisions of the Revised Statutes, as amended:
>
> "NJSA 9:202: "When the Superior Court has jurisdiction over the custody and maintenance of the minor children of parents divorced, separated or living separate, and such children are natives of this state, or have resided five years within its limits, they shall not be removed out of its jurisdiction against

> their own consent, if of suitable age to signify the same, nor while under that age without the consent of both parents, unless the court, upon cause shown, shall otherwise order."
>
> "N.J.S.A.9:2-4: "***in no case shall the Court having jurisdiction in this state over the person and custody of any minor permit such child to be removed from this State where the mother or father resides in this State and is the suitable person who should have custody of such child for its best welfare".

"This legislation supplements the parens patriae jurisdiction of the court, Fantony v. Fantony, supra (21 N.J.,at p.535). Section 9:2-2 evinces a strong policy predilection for keeping minor native residents of this State of tender years, children of divorced parents or separated parents, from being removed from the jurisdiction without the consent of both parents. Grove v. Grove,26 N.J.Super.154,157 (App.Div.1953); Sheehan v. Sheehan, 38 N.J.Super.120,126 (App.Div.1955). Only if the court is satisfied that the best interests of the child

call for it may such removal take place. And the Court before which cause must be shown is the Superior Court of this State not a tribunal of another jurisdiction. Equally integral to our local public policy is the requirement of Section 9:2-4 that no child shall be removed from the State where a New Jersey court determines that a New Jersey resident parent is his suitable custodian. See Matflerd v. Matflerd 10 N.J.Super.132 (App.Div.1950)."

This Court concludes on this issue that from the testimony it has heard that this Court has jurisdiction to hear this matter.